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WASHINGTON CORPORATIONS

CONTAINING THE

STATUTES OF THE STATE OF WASHINGTON

RELATING TO CORPORATIONS AS AMENDED TO AND INCLUDING THE SESSION OF 1913

TOGETHER WITH A

SUMMARY

OF THE GENERAL CORPORATION LAW, INCLUDING EMINENT DOMAIN, AN OUTLINE OF CORPORATE PROCEDURE, ANNOTATIONS, AND FORMS

BY

STEPHEN A. McINTIRE, A.B., LL.B.

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As a Mark of Affectionate Respect

This Book is Inscribed

to

Joseph H. McIntire.

PREFACE.

This book is intended to bring within handy reach and ready reference by the practitioner the principal rules of Corporation Law in the State of Washington, with the most weighty authorities therefor—in the Summary making accessible ruling decisions in general, scattered in digests and commentaries; in the Statutes (i. e., of Washington affecting corporations, as compiled by the Secretary of State and reverified from the Session Laws), collecting and arranging, in notes and annotations to the various sections, the Washington decisions construing and bearing upon the statutory provisions; and in the Outline of Procedure pointing out the sections of the statutes regulating particular matters, and requisites for compliance with them, together with numerous forms most frequently required for use.

S. A. M.

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INTRODUCTION.

As is the case with much of our common law other than land tenures founded on the rules of mediaeval feudalism, we are largely indebted to the civil law, the jus civile of the ancient Romans, for our conception of a corporation and the basic foundation of the rules of law, that have become established, governing corporate relations.

The term "corporation" is derived from the Latin verb "Corporare," to form into a corpus or body, and is used to describe the result of associating individuals into one body, entity or unit, recognized as such by the law, as distinguished from merely associated individuals acting together. To illustrate: Title to land owned by a corporation is in the corporation as such, and the members of the corporation have no title to the land, and accordingly dealing with such property is simplified, since the title is not affected by the life or death or other vicissitude of the individual members of the corporation.

So the corporate rights and liabilities in general are quite distinct from those of the individual members who become such and cease to be such in perpetual succession during the corporate existence without in that respect affecting the corporate status in the least degree.

These peculiar characteristics of corporations have been developed in much detail in the American and English statutes and decisions, but the conception of the corporation was originated by the Romans, as appears from the readings in the Institutes of Justinian and the Digest, nomine "Collegia," the term which was applied by the Romans themselves to what we term by the Latin derivative "Corporations." The Collegia of the Romans or Universitates were formed for various public and private purposes, and distinguished by names descriptive of such different objects, as, e. g., Civitates, for pub-

lic governing bodies similar to our municipalities, and Fabri, Pictores, Naviculariі, for business, trade, and other purposes.

In all these societies the unity of the juristic person as distinguished from the individual members in the matter of succession, the right to sue and be sued, and the ownership of property wholly independent of the individual members, was fully recognized and applied.

This conception of a corporation was all along more or less familiar to the scholastic clerics versed in Latin and Roman institutions, and the ecclesiastics of England early adopted it as a device to perpetuate their ownership, in clerical succession, as distinguished from individual inheritance or devolution, of the property, mostly real, that from religious or other motives was donated to them from time to time for charitable and church purposes. They applied and utilized the corporation, therefore, in all instances to accomplish succession of property in the members of societies, educational, religious and charitable, and as well in the successive individual incumbents of offices, in time classifying their corporations into aggregate and sole, according as they were societies or a succession of individual incumbents of an office.

It was but natural that the corporation previously utilized for governmental and charitable purposes should be adopted for business purposes as soon as manufactures, trade and commerce began to take the place of the more primitive pursuits, and co-operation in associations of individuals and property was found necessary for the more efficient and successful accomplishment of business objects than could be attained by the individuals acting separately or in cumbersome partnerships. Once adopted for business purposes the use of corporations for joint stock business objects rapidly extended and led to the further classification of corporations into ecclesiastical and lay, civil and eleemosynary, public and private.

The public corporations, cities, merchant fraternities, and the like were undoubtedly antecedent to private corporations and furnished the conception for the latter. The res publica, public thing, or community of interest, recognized as the common important concern of that sturdy band of robbers who fortified themselves on the seven hills by the Tiber about

eight hundred years before the Christian era, became the Respublica, dominant mistress of all the known world in the centuries prior to and succeeding the appearance of Jesus Christ. Similarly during the Roman supremacy, and afterward, municipal or town communities and cities became established in all the countries now comprising Europe, and these cities and towns, with their merchant orders and fraternities, all during the period of the decline of Rome and the Middle Ages, and so on down after the revival of learning, kept alive the spirit of freedom and liberty once characteristic of the Romans, and against eccleciastics, kings and feudal barons fought the fight, ultimately victorious, for political freedom.

While, however, the public corporation was being largely instrumental in the fight for political freedom, the private corporation from the earliest was subject to various abuses which attempts were made to correct by the Romans and later by their successors in government.

In England, as before said, the ecclesiastics adopted the corporation for the purpose of succession in their ownership of property, with the result that the eccleciastical corporations, aggregate and sole, including monasteries, churches, bishops, vicars, et al., soon bade fair in a comparatively brief period to acquire into their spiritual hands most, if not all, the lands of England.

This was regarded as an abuse by some, particularly the king and the feudal barons, whose incidents of tenure were thus cut off by what they termed the dead hand of the church and its members thus incorporated. They therefore proceeded to correct the evil by acts of Parliament, in the various Statutes of Mortmain so called, providing for the forfeiture of lands donated or conveyed to corporations.

That the abuse was dangerous and one with which it appeared difficult to deal effectively, as well as the mischief aimed at, is apparent in the preamble of the Statute De Religiosis, A. D. 1279, commonly called the Statute of Mortmain, "Where of late it was provided that religious men should not enter into the fees of any without license and will of the chief lords of whom such fees be holden immediately; and notwithstanding such religious men have since entered as well

into their own fees as into the fees of other men appropriating and buying them, and sometimes receiving them of the gift of others, whereby the services that are due of such fees, and which at the beginning were provided for the defence of the Realm, are wrongfully withdrawn and the chief lords do lose their escheats of the same; we therefore, to the profit of our Realm, intending to provide convenient remedy by the advice of our prelates earls barons and other our subjects being of our council have provided established and ordained, that no person religious or other whatsoever he be presume to buy or sell or under color of gift or lease or by reason of any other title whatsoever it be, to receive of any man, or by any other craft or device to appropriate to himself any lands or tenements, under pain of forfeiture of the same whereby such lands or tenements may anywise come into Mortmain."

By Statute of Richard II this prohibition was extended to include all corporations, business as well as religious, and from the Statute of Wills of Henry VIII, enabling devises of land, corporations were excepted as devisees. By the Act of George II, commonly called the Mortmain Act, all devises to charitable uses, whether to corporations or individuals, were prohibited, while by the Wills Act of 1837 the old provision against devises to corporations was omitted, such devises falling under the old Statutes of Mortmain. Finally, by the Mortmain and Charitable Uses Act of 1888 corporations are prohibited from taking land for any purpose without license from the crown. It will thus be seen that from the earliest days it has been the policy of England, rigidly adhered to and enforced, to prevent land from being held by corporations and thus sequestered from individual ownership.

In America the adaptable spirit of enterprise characteristic of Americans seized upon the corporation from the outset, as the instrumental means affording the co-operation necessary to the successful attainment of desired ends, in the struggle with natural forces and conditions hitherto unsubdued.

With ever-increasing frequency the corporation has been utilized for such co-operation in the attainment of purposes, great and small, until at present the corporation is formed

almost universally for the accomplishment of public and private objects, whether religious, educational, charitable, or for business and pecuniary profit.

Common as they have become, however, corporations have always been looked upon, by those not immediately benefited, with more or less jealousy, fear and hatred, and as an institution to be blamed for any existing ills not otherwise accounted for in a manner satisfactory to the less successful and fortunate members of the community. Indeed, attempts have been made by the states to stay the tide of corporate influx, but with a degree of success very like to that of Canute in stemming the waves of the sea by royal mandate.

Chancellor Kent, in his Commentaries written about 1825, says:

"The propensity, in modern times, has, however, been to multiply civil corporations, especially in the United States, where they have increased in a rapid manner and to a most astonishing extent. The demand for charters of incorporation is not merely for municipal purposes, but usually for the more private and special objects of assisting individuals in their joint stock operations and enterprising efforts, directed to the business of commerce, manufactures and the various details of internal improvement. This branch of jurisprudence becomes, therefore, an object of curious as well as deeply interesting research. The multiplication of corporations, and the avidity with which they are sought, have arisen in consequence of the power which a large and consolidated capital gives them over business of every kind, and the facility which the incorporation gives to the management of that capital, and the security which it affords to the persons of the members, and to their property not vested in the corporate stock. The convention of the people of New York, when they amended their constitution in 1821, endeavored to check the improvident increase of corporations by requiring the assent of two-thirds of the members elected to each branch of the legislature to every bill for creating, continuing, altering or renewing any body politic or corporate. Even this provision seems to have failed in its purpose; for in the session of 1823, being the first session of the legislature under operation of

this check, there were *thirty-nine* new private companies incorporated, besides numerous other acts amending or altering charters. The various acts of incorporation of private companies for banking, manufacturing, literary, charitable and insurance purposes, for turnpike and railroads, and toll bridges, and for many other objects upon which private industry, skill and speculation can be freely and advantageously employed, constitute a mighty mass of charters, which occupy a large part of the volumes of the statute law in almost every state."

In noteworthy contrast is the statement, for example, of Mr. Frank White in the Introductory to his work on New York Corporations of the year 1905, as follows: "The number of corporations formed under the laws of this state during the calendar year 1904 reached the record figures of 4,420, and in view of the fact that 505 new corporations came into existence here in the month of January, 1905, it is fair to predict that the current year will show an aggregate in excess of the high record of the preceding year."

In other words, thousands of corporations are now formed yearly in every state, though the jealousy and fear of corporations has increased rather than diminished since the time of the foregoing statement by Chancellor Kent, and in fact was probably never greater than at the present day.

The reason is not far. The corporation, like all things human, institutions included, has its good uses and its abuses, and as yet, in the minds of the majority of the people concerned, the good prevails over the bad. The problem as to how the abuses may be eliminated without destroying the root and the sap, and so the good tree itself, remains to be worked out. And indeed it must be worked out and cannot be solved by good or evil catastrophe. The pruning-iron must be applied as wisely as possible to cut away the already advanced growth of abuse, but the tree fruitful of general good can only rise by the slow steps of growth and evolution. Natura non facit saltum. Growth is gradual in all natural development, and neither political nor economic progress constitutes an exception to the general rule. If this simple truth, generally enough understood, could by some forceful accentuation be

brought home to the consciousness of the public so as to be really felt and actually sensed, sufficiently to be kept in mind, the way would be cleared for real progress in the correction of abuses that undoubtedly exist, and much bellowing flabbergast would be eliminated for want of audience.

It is to be noted that the corporation in America, both in its legal status and its extensive use, is different in several particular respects from its prototype in England. There corporations, time out of mind, have come into existence in several ways—by royal grant, by prescription and by act of Parliament—while with us the corporation exists only by virtue of, and to the extent of, the authority conferred by the statute governing the case. This involves a diametrically opposite approach to certain questions—e. g., as to the extent of corporate powers—for in England the question is one of statutory limitation of powers otherwise potentially existing, and the validity of corporate acts, ultra vires, or beyond the express powers conferred by the corporate charter, being not necessarily for that reason null and void, is left still to be determined. But with us the charter contains the limit or boundary set by the creating statute to the corporate power and existence, and any corporate act attempted beyond that limit has no greater legal validity as a corporate act than if the charter had not been granted and the corporation not created.

Another important respect in which American corporations are different from English is that the Mortmain Acts have never been enacted in America except in Pennsylvania, and have been repealed in that state, so that while we hear continually the cry of the single-taxers and others, attributing inequality in wealth to the unearned increment of value in land owned by individuals, which, whatever may be thought, cannot be remedied without a violation of the fundamental principle of private property, the corporation which is the mere creature of statute, with no rights as an individual and no rights of any sort except what are expressly given by the creating statute, is everywhere allowed, with little remonstrance, to acquire and hold land ad libitum, and oftentimes in large tracts, for the express purpose purely of

realizing the aforementioned unearned increment or increase in value. A compulsory disposition at the market within a limited period of their lands, not directly needed by corporations for their corporate purposes, would be in most cases constitutional as well as consonant with the best spirit of our Anglo-Saxon institutions, and would reopen a wide door of opportunity to the individual. Some well-considered application of the principle embodied in the time-honored Statutes of Mortmain is worthy of consideration.

Another peculiarity of our corporation laws is their diversity. Our corporations are formed for the most part under state laws, and these, while similar in many respects, are divergent in others, so that business men about to incorporate have a line of forty-five and more varieties of corporate vestments from which to choose that best adapted to their needs; and it is not uncommon for men doing business in New York City, with no idea of going elsewhere, to incorporate, for example, in Arizona. This condition of things soon brought about a competition among the various states and territories in offering inducements to influence the choice of the state in which to incorporate as the legal domicile of the corporation, the recognized object being to attract capital to the state and incidentally to swell the state funds in the treasury with incorporation taxes and franchise license fees. This, oddly enough, is without much doubt, to a large degree, responsible for the liberalization of the corporation laws of the various states to a point of laxity otherwise not likely to have been reached. To be sure, a general sweeping provision against monopoly is contained in most of the statutory corporation laws of the various states, but in the prevailing status of corporation laws as at present existing such a provision is not dissimilar in its effectiveness to a legislative enactment authorizing debauchery but prohibiting crime.

Congress has also fulminated against supposed evils in the Sherman Anti-Trust Act of 1890 with an effectiveness not unlike that of a stuffed cat upon pilfering rodents and with little other result than of late a noisy cracking of shells for the squirrels to eat the meats of nuts collected.

The uses of corporations are great, and, left uncurbed, perhaps encouraged, whether consciously or not, grow into abuses that cannot in the nature of things be effectively corrected by ex post facto legislation.

The fundamental use of the corporation is the facility it affords for continued effective co-operation of numbers of individuals, their labors and capitals. The combined effort of such union, not occasionally but usually, produces a multiple of the result that would be obtained by the aggregate of the same individuals, their labors and capitals, in independent undertakings. The decreased cost of production and the increased returns in the larger establishment, due to lesser duplication and more economic utilization of fixed capital, the greater skill of the superintendence, and the more perfect division of labor, are generally recognized. The possible extension of this principle to greater and still greater establishments is without definite limit. Limits have been set in theory, only to be exceeded in practice, and while instances may be cited of establishments so great as to be unwieldy, in which the scale is turned and the economic losses more than counterbalance further economic gains, proof thereby is made only of the need of greater skill of superintendence, and the principle of increased returns still remains. In a general way, and allowing exceptions, economic experience proves that the gross returns to total labor and capital expended increase in more than proportionate ratio to the enlargement of the establishment, and of the practical truth of this our so-called trusts are concrete examples. The corporation makes not only possible, but feasible, combination and co-operation that could not otherwise be approached, and thus makes practicable the indefinite enlargement by growth and consolidation of great establishments, with the incident economic increase of total product. This can have but one result upon the small establishment; it goes down in the struggle, and is absorbed into the greater or forced out of business. The wail of defeat is heard through the land that competition is destroyed and monopoly is rampant. This is supposed to be a sufficient condemnation, but this is not true unless competition be an end in itself and monopoly neces-

sarily bad. If competition were an end good in itself, and to be sought for its own sake, then all co-operation would best be eliminated. Competition is desirable in so far as it is conducive to individual effort and affords incentive to individual enterprise, keeping open the door of opportunity and forcing the best product at the lowest cost, thus tending at the same time to reward effort and benefit the public. But often competition is not conducive to these ends, but opposite in its tendency, and such competition may well be eliminated by co-operation.

Monopoly, too, is an ill-sounding word, the application of which merely in a particular instance proves nothing without such further explanation as to show the existence of some real evil or abuse. If monopoly be used to describe the elimination of competition to a certain degree, it is often merely the application of an abusive epithet to what, in the interest of the community at large, is a beneficent condition.

Suppose, for illustration, that in a sudden cataclysm of frenzied philanthropy the owners of the Standard Oil Company, to avoid the proceedings that culminated in the decision for the dissolution of the company in 221 U. S., had decided to divide the stock of the company among the consumers of oil and the other products of the company in the United States, and the stock of the company had been distributed among the consumers in the ratio of consumption and the company then had continued with the stock so distributed; the net result would be that the consumers of oil in the United States would, through the instrumentality of what is now regarded as a wicked monopoly, be producing their own oil at the lowest possible cost and sharing in the profits from the sale of the company's products abroad. *Assuming, for argument's sake, such a state of things possible,* would anyone gainsay its beneficence? Still the elimination of competition and the control of production and of prices would exist to the same degree. Monopoly, in a different sense, in the sense of concentration of property in the hands of a few individuals by the concentration of stock ownership, would be eliminated. Is it not true, then, that the great corporate establishment itself, demonstrably more economic as a pro-

ductive agent, is not in itself an evil, call it monopoly or what you will, but, under existing conditions and rules, regulating the control and management of corporations, there has come about a concentration of stock ownership that is the real evil, and a resulting concentration or monopoly of wealth and dominance of production and distribution by a few that is indeed no less intolerable than was the political dominance by the feudal barons of the Middle Ages?

Concentration of stock ownership is the real monopoly, the real specific abuse, to be prevented and cured, and not merely fulminated against after the fact exists.

The problem is not one of the production, but of the distribution, of wealth. Admitting this, many will say at once that the true remedy for this and for all problems of distribution is socialism, i. e., some form of common ownership of property and administration of business—say, government ownership of property and conduct of business, as distinguished from the present individual ownership.

Socialism appeals to two classes: 1. Idealists, who dream of an impossible equality of wealth; 2. Those certain shiftless, incapable, improvident individuals who have little or nothing, and are not above the desire to share in a division of other people's property.

To the real American, intelligent, self-respecting and of that pride of manhood that is the admitted heritage of Anglo-Saxon people, it is abhorrent, as being fundamentally inconsistent with that freedom of action in the conduct of life and pursuit of happiness that is prized above every vicissitude of fortune or misfortune, wealth or poverty. Socialism, of very necesssity, imports some constituted authority, governmental or other, somewhere in the community that shall, irrespective of the individual will, determine the fitness and capacity of the individual, his place in the community, the value of his service, the amount of his compensation, the limitations of his life, the measure of his pursuit of happiness. No material wealth would make such conditions tolerable to free men. Furthermore, if it were tolerable, no human agency, however selected, could determine the relative capacity, physical, mental and moral, the character of work or

service to be rendered by each to the community, and especially the relative value of services performed by the individual members of the community. Such a function would require little short of infinite intelligence, knowledge and goodness. Still further, if socialism were either tolerable or possible, it would not be feasible for more than a short-lived experiment, for it is not in accord with the nature of human life, and would remove all incentive to human progress. The history of man, like that of all life, is the story of struggle for existence and survival. It is man's nature to struggle first for the means of subsistence, and that once gained, to continue to struggle to gain distinction of one sort or another, or at least to better his condition as compared to that of his fellows.

Equality of wealth or well-being in men is therefore neither possible nor desirable. It would be like requiring in a footrace that all the runners should keep abreast and at the end all touch the tape at once. Just as such a rule would destroy all zest in the footrace, so would equality of wealth and well-being in men destroy the incentive that must subsist in the individual to better his own relative condition.

Acquisition and individual betterment, not possession, be it great or small, are the incentives to progress.

But there are many who would readily assent to the position that socialism would be for the various reasons intolerable and impossible, yet believe that some sort of government ownership and control of property and business is necessary in order to correct the growing inequality of wealth, erroneously attributed, as before stated, to the so-called trusts as instruments of production, rather than to the concentration of their stock ownership, which is the real abuse.

Mr. Cook, for example, the well-recognized authority on corporation law, in the preface to the last edition of his work on Corporations, while recognizing the impracticability of socialism, proposes as a remedy for our railroad problem a gigantic holding company to purchase the railroads of the country, under the supervision, guaranty and partial control by the government. Assuming that it would be practical to dispose of such a tremendous stock at one time to the public

sufficient to enable the acquisition of the roads, who would be likely to buy the stock in such tremendous amounts under the plan but the great interests to-day owning the roads, thus virtually selling their own property to themselves at a large profit to themselves?—their profits being measured in a not widely different way from what they have been in other similar cases, namely, by the extent to which the outside public should come in and buy stock with real cash out of pocket, the government, by being a party to the transaction, having little other effect than to cause the machinery of manipulation to revolve more smoothly.

An experiment in straight-out government ownership and operation would be preferable to that, and much could be said for public ownership of the railways, telephones, telegraphs and other public utilities to prevent unneeded duplication and bring about adequacy of service and equality of charge to the public, if there could be devised a civil service, free from plunder and graft, efficient to the adequate administration of such vast business.

In the railways, however, and other public utilities is to be found, to a superlative degree, the concentration of stock ownership, with the corollary discrimination in service and rates, calculated only to increase the power and wealth of the controlling few at the expense of the rest of the stockholders and the public generally.

The concentration of stock ownership in the great corporations constitutes an economic feudalism to-day not dissimilar in essential respects to the political feudalism of centuries past.

The great corporation, efficient agent of production, is indeed not to be destroyed for an evanescent socialist dream, but the method of its control, which has grown into an abuse in the concentration of stock ownership, must be remedied by a gradual growth in the opposite direction by regulations that shall have a compelling tendency toward a more and more widely distributed stock ownership and control. Just as the public corporation kept alive the spirit of freedom in the Middle Ages and was largely instrumental in bringing about political freedom, so may the great private corporation, by

reason of its very efficiency as an agent of production, be made instrumental in bringing about economic freedom and equality of opportunity, but likewise it must change from an oligarchy to a democracy.

The time is at hand when the political state should be divorced from the economic. It is the function of government, national, state and municipal, to prescribe and execute *the rules* governing the acquisition, ownership and disposal of wealth. Let it confine itself to that function, and in its performance thereof let it regulate its creature, the private corporation, so that its stock may become, by natural processes, in course of time, widely and more widely distributed and its control popularized, and thus may, and it may be confidently asserted will, be developed an economic state composed of these corporations without geographical locality or limit, and with such a distributed stock ownership, that they will be at once the most efficient instrument of production, and a bulwark of economic freedom and equality in the distribution of wealth.

It is not, however, to be supposed that an economic state of freedom can be brought forth full-grown at a leap like Pallas Athena from the head of Jove. It cannot be too strongly emphasized that economic well-being cannot be brought about by government fiat, but only by patient, persistent struggle, as was political freedom and like all good development and growth. Government can do no more than prescribe *the rules of the game.* The people must struggle individually and together for the prize of economic freedom. We have heard of the rights of the people ad nauseam. Let us hear more of their duties to themselves and one another, individually and as a whole.

Rules or laws of a compelling tendency to bring about a wider and gradually wider distribution of stock ownership are not at all impossible or impracticable, nor would they be revolutionary or inconsistent with private property, and individual freedom in enterprise and acquisition of wealth.

The corporation is the creature of statute, and in most cases to-day is subject to state regulation, limited only by the vested rights of individuals and public policy. The corpora-

tion, therefore, has none of the inalienable rights of the individual, and the method of its control and stock ownership is not a matter of right at all, but of policy purely. A limitation, therefore, of the amount of stock to be owned or controlled by any individual in any corporation would, generally speaking, be no violation of any corporate right, and would not be open to the several objections against limiting the amount of property generally to be acquired by the individual, since he would still be free to exercise his enterprise to acquire as much other additional property as he could lawfully become possessed of. It is presumed that no one will suppose that a suggestion is made to confiscate stock-holdings; just as concentration of stock has been a development, so wider distribution should be brought about gradually and by slow degrees. It is feasible to enact and enforce a law requiring all stock-holdings of any individual in any single company in excess of five million dollars, e. g., par or market value, to be disposed of to the public within a reasonable period on pain of condemnation and sale at an appraised valuation, and that all similar stock-holdings in excess of three million dollars be similarly disposed of within some longer period, thus by degrees reducing the amount of stock held or to be held by any individual in any one company. This would have the effect "of bringing the public in" in a way that would really, in the course of the time that would suffice to bring about such change, be beneficial to all,—to the corporation as an efficient agent of production, for there would be a broader public interest in its successful operation and a much wider circle of interested owners from whom to select the managing trustees; beneficial to the public to the extent of their greater share in the particular corporation and its wealth-bringing capacity,—and really beneficial to the present stock magnates, for the greater their property stake the greater their real interest in whatever conduces to the permanent public advantage. A well-considered law of such character, generally enacted and enforced, would be a long stride toward democracy in the economic state.

Another modification in our corporation laws, necessary in the interest of the citizen of average means, potential if not

actual stockholder, is such regulation of the governing board of corporations, while leaving them wide discretion, as shall make of them not only directors for the now very limited controlling few, but really *trustees,* representing and responsible to all the stockholders; and to that end they should be elected by groups of stock, in order that no one large block of stock should practically appoint the whole board; and further, they should be removable at the will of those electing them, and should be held to account fully, whenever required, to any and all stockholders in the same manner as a trustee to a cestui que trust, in order that the small investing stockholder may actually feel that without prolonged legal contest he can readily learn from time to time how the business which is his own pro tanto is being conducted. At present, furthermore, directors are paid practically nothing for their services, and their main incentive to advance the interests of their corporation is to enable them to manipulate and job the stock to their own pecuniary advantage, very often to the actual sacrifice of the interests of the average stockholder. With limitation of stock ownership and making of directors actual trustees, the baneful incentive of stock-jobbing and manipulation should be replaced by sufficiently large salaries to attract men of first-rate business capacity to compete for the office of trustee of the stockholders to manage the corporate business purely as such.

One constant and matter-of-course corporate practice, moreover, the continued toleration of which is an abuse of the first magnitude, is little less than a reproach to the intelligence of the business community interested, and which is especially conducive to concentration of stock ownership and control and to coterie manipulation and management of corporate concerns, is accumulated proxy voting at corporate elections.

The ordinary corporate election often is farcical. At the time appointed the directors interrupt the usual office routine and go through a formality just sufficient to warrant a corporate record of action taken. If a lone stockholder appears, he is eyed askance, given a cigar, seated in a corner with the morning paper to read, and his presence tolerated with amused condescension until ennui and satisfied curiosity leads

him to depart. The directors, when the spirit moves them, light cigars and declare the meeting in session, report to themselves in a satisfactory manner as to their conduct of the corporation, and at the proper time declare the polls open, produce a neat bundle of proxies, which they then proceed to vote, declare themselves or their appointees elected, and adjourn the meeting. They sometimes fall out and a contest is precipitated, and honest men get their dues to the extent of determining which has the larger bundle of proxies.

This is an abuse developed by force of custom from its origin in the inconvenience for the individual stockholder to attend meetings in person, increased in the case of bodies of stockholders living at great distances apart. The small stockholder feels the inconvenience, and knows that his individual vote or votes will count little in influencing the result, and further, he knows that others similarly situated will give their proxies to the controlling directors, so that unless he be some contumacious fellow, with an absurd notion that his property interest, though it be a small one, is for him to manage and dispose of himself, he takes the easiest way and joins the procession by sending his proxy to the controlling director.

In fact, stockholders' meetings in person in our private corporations to-day are as antiquated and more impracticable for the accomplishment of results really beneficial to the business community than would be general town meetings in the municipal government of our great cities.

Furthermore, it is just as much for the interest of the small stockholder as for the large to select the most competent directors to manage the corporate business, and as in the public or municipal corporation all citizens have equal voting power in the selection of officers, irrespective of the extent of their property interest, so in private corporations, in the election of directors at least, all stockholders should have an equal vote, irrespective of the extent of their stockholdings. Further, in public corporations voting by proxy would not be tolerated. It is no less absurd in private corporations that often represent business and public interests far greater than

those of any but the greatest municipalities. Accumulated proxy voting ought to be done away with and corporate elections of directors held by taking vote by ballots duly executed and collected by mail from the stockholders, each stockholder having one vote and no more.

Another important and very requisite regulation of corporate conduct, that the stockholders of a corporation may be cognizant of its affairs, is the establishment of boards of auditors elected directly by the stockholders and independent of the directors, and these auditors should have at all times free access to all corporate books and records, and they should be under the duty to furnish from time to time to all stockholders full information regarding the business and general condition of the corporation, and any information whenever called for by any stockholder.

Some directors would throw up their hands in horror at such auditing as calculated to lay open business and trade secrets to competitors. But this is largely a fictitious bogle to guard the real esoteric mystery which they would truly keep undisclosed, namely, their clever manipulations for their own personal unjust enrichment.

Still another respect in which corporate regulation is both feasible and worthy of serious thought is one already adverted to, namely, the application of the principle of the Statutes of Mortmain to land-holdings by American corporations. As a policy to be adopted de novo, the creation by statute of fictitious entities to hold large tracts of land for periods of years purely for speculative purpose would probably find few serious advocates. Still, it is the undoubted fact that vast tracts of land in various parts of the United States, particularly in the west, are held by corporations not only for speculative purposes simply, but for the particular purpose of preventing their present development by other companies or individuals. The compulsory sale to the public of all lands held by corporations, not clearly shown to be necessary for immediate corporate purposes, is feasible without striking opposition of private right or public policy; indeed, it may be doubted if substantial grounds of public policy will, in the majority of cases, support land-holding by corporations

other than by way of lease for a limited period of corporate existence.

The foregoing corrective regulations suggested would not, to be sure, bring about forthwith a millenium of equality of wealth, or otherwise revolutionize the laws of nature as found existent in human as in other growth and evolution, but, enacted in well-planned legislation, would, it is believed, be a substantial advance in the rise of an economic democracy out of the present freebooting, piratical state of finance and business.

STEPHEN A. McINTIRE.

Portland, Oregon, October 12, 1912.

SUMMARY

OF

CORPORATION LAW.

CHAPTER I.

CORPORATE EXISTENCE.

§ 1. In determining most questions of corporation law, it is especially conducive to correct decision always to keep clearly in mind the source of corporate existence, that it is statutory purely, that a corporation is wholly the creature of statute, and exists, acts, terminates, acquires rights, and incurs liabilities by virtue of and only within the scope and limits of the creating statute. The corporation differs diametrically from the common-law partnership in this particular respect, and most of the legal distinctions between corporations and partnerships may be traced to this fundamental difference, that a partnership is an association of individuals who have as such, just as the individual has, from time to time, asserted certain rights which have been recognized by the common law in judicial decision, and have been abridged or enlarged from time to time by statute; while the corporation, on the other hand, does not exist at all but within the statute.

The characteristics of a corporation are stated by Thompson, Justice, in Runyan v. Coster, 39 U. S. 120, repeating substantially the language of Chief Justice Taney in Bank of Augusta v. Earle, 38 U. S. 517, as follows:

"The rights and powers of a corporation were very fully examined and illustrated by this court at the last term in the case of the Bank of Augusta v. Earle, 13 Pet. 584, in which case and in various other cases decided in this court a corporation is considered an artificial being existing only in con-

templation of law; and being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it either expressly or as incidental to its very existence. That corporations created by statute must depend for their powers and the mode of exercising them upon the true construction of the statute. A corporation can have no legal existence out of the sovereignty by which it is created, as it exists only in contemplation of law and by force of the law; and that when that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty; but though it must live and have its being in that state only, yet it does not follow that its existence will not be recognized in other places, and its residence in one state creates no insuperable objection to its contracting in another. The corporation must show that the law of its creation gave it authority to make such contracts, yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person in the state of its creation is acknowledged and recognized by the state or nation where the dealing takes place, and that it is permitted by the laws of that place to exercise there the powers with which it is endowed."

§ 2. A corporation is a person, is individual and is an inhabitant, resident and, for some purposes, a citizen of the state creating it.

"A corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state." (Wayne, J., R. R. Co. v. Letson, 2 How. (U. S.) 555, modifying Bank v. Deveaux, 5 Cranch (U. S.), 84.)

"That corporations are in law, for civil purposes, deemed persons is unquestionable, and the citation from 2 Inst. 736, establishes that they are so deemed within the purview of the penal statutes. Lord Coke there, in commenting on the statute of 31 Eliz., c. 7, respecting the erection of a cottage where the word used is 'no person shall,' etc., says: 'This extends as well to persons politic and incorporate as to natural persons whatsoever.'" (Story, J., in holding that the words "person or persons" in a criminal statute included corporations, United States v. Amedy, 11 Wheat. (U. S.) 411.)

"The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men." (Marshall, C. J., Bank v. Billings, 4 Pet. (U. S.) 561.)

"In the jurisprudence of the United States a corporation is regarded as in effect a citizen of the state which created it." (Swayne, J., in St. Louis v. The Ferry Co., 11 Wall. 428.)

"A corporation can have no legal existence outside of the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicile at will, and although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there." (Davis, J., in Insurance Co. v. Francis, 11 Wall. (U. S.) 216.)

§ 3. A corporation, if actually incorporated in different states, becomes a resident in each of the states in which it is so incorporated.

"The Boston, Hartford and Erie Company, therefore, though made up of distinct corporations chartered by the legislatures of different states, had a capital stock which was a unit and only one set of shareholders, who had an interest by virtue of their ownership of shares of such stock in all of its property everywhere. In its organization and action and the practical management of its property it was one corporation, having one board of directors, though in its relations to any state it was a separate corporation, governed by the laws of that state as to its property therein. It therefore had a domicile in each state, and the corporators or shareholders could, in the absence of any statutory provision to the contrary, hold meetings and transact corporate business in any one state so as to bind the corporation in respect to its property everywhere." (Blatchford, J., in Graham v. Boston etc. R. R. Co., 118 U. S. 169.)

"This court has often recognized that a corporation of one state may be made a corporation of another state by the legislature of that state in regard to property and acts within its territorial jurisdiction. Ohio & Mississippi R. R. Co. v. Wheeler, 1 Black, 286, 297; Railroad Co. v. Harris, 12 Wall. 65, 82; Railway Co. v. Whitton, 13 Wall. 270, 283; Railroad Co. v. Vance, 96 U. S. 450, 457; Memphis & Charleston R. R. v. Alabama, 107 U. S. 581; Clark v. Barnard, 108 U. S. 436, 451, 452; Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 334; Graham v. Boston etc. R. R., 118 U. S. 161, 169; Martin v. Baltimore & Ohio R. R., 151 U. S. 673, 677. But this court has repeatedly said that in order to make a corporation,

already in existence under the laws of one state, a corporation of another state, 'the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state or by the legislature and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation does not do this.' Pennsylvania R. R. v. St. Louis etc. R. R., 118 U. S. 290, 296; Goodlett v. Louisville & Nashville R. R., 122 U. S. 391, 405, 408; St. Louis & San Francisco Ry. v. James, 161 U. S. 545, 561." (Gray, J., in Louisville Ry. Co. v. Louisville Trust Co., 174 U. S. 562.)

ORGANIZATION OF A CORPORATION.

§ 4. The question not infrequently arises as to what constitutes organization of a corporation. In general, it may be said that a corporation is organized when enough has been done in compliance with the statute under which the corporation is formed, so that the corporation is in a position to perform corporate acts. In order that the corporation may be in such a position rightfully or de jure, all antecedent provisions of the statute must have been complied with, but if no statutory provision has been neglected, though not strictly complied with, and the formation of the corporation has progressed to the stage where officers or official representatives have been appointed who may perform acts in the corporate name, the corporation may be said to be organized at least de facto.

§ 5. In McGuty v. Athol Reservoir Co., 155 Mass. 183, where only one of the persons named in the certificate met with others and adopted by-laws and chose officers, it was held that they constituted a corporation. Morton, J., said:

"At least one of the persons named in the act of incorporation, without objections, so far as appears, from the others, with seven persons not named in the act, duly met on June 21, 1854, and accepted the act of incorporation, adopted by-laws, chose officers and transacted other business. It is clear that the persons who took part in these proceedings became a corporation under the name of 'The Athol Reservoir Company.'"

In Braintree Water Supply Co. v. Braintree, 146 Mass. 482, where, under an act of incorporation, all the members

united in electing directors and a president, though statutory notice was omitted, the corporation was held to be organized.

In Ossipee Hosiery & Woolen Mfg. Co. v. Canney, 54 N. H. 295, where the first meeting was called on fourteen instead of fifteen days' notice required by statute, and by-laws adopted and a clerk chosen, it was held that the corporation was "organized as a company" under the act.

In Judah v. American Live Stock Ins. Co., 4 Ind. 333, where stock had been subscribed and directors elected by all the stockholders, though commissioners did not, as required, receive subscriptions and call the meeting of stockholders, the company was held legally organized.

In Hunt v. Kansas & M. Bridge Co., 11 Kan. 412, where persons named in the act of incorporation opened books for subscription to the capital stock of the company, and ten per cent was subscribed and an election of directors and officers was held as required by the act, the company was legally organized for the transaction of business.

In Union Water Co. v. Kean, 52 N. J. Eq. 111, where notice of the opening of subscription books was given and the stock was subscribed by the incorporators and a stockholders' meeting was held and directors and officers elected, the corporation was held sufficiently organized to institute suit.

§ 6. In Walton v. Oliver, 49 Kan. 107, where nothing was done but to file a charter naming certain persons as directors for the first year, it was held that there was no organization sufficient to enable the corporation to do business, the court construing "organized" to require the election of officers, the subscription and payment of the capital stock, the adoption of by-laws, and such steps as are necessary to endow the legal entity with the capacity to transact the legitimate business for which it was created.

In McVicker v. Cane, 21 Or. 353, nothing appeared to have been done but the filing of the articles of incorporation, and this was held not enough to create a corporate entity with power to contract and transact business. Lord, J., said:

"In the case at bar there was no stock, nor subscription of stock, nor officers nor board of directors, nor anything done

to perfect the organization. It is true that the whole amount of stock is not required to be subscribed to entitle the corporation to proceed with the organization; but the amount provided by section 3222, Hill's Code, must be subscribed before the corporation can be legally organized. (Coyote etc. v. Ruble, 8 Or. 284.) In the case last cited, Kelly, C. J., said: 'Where the statute prescribes the manner in which the corporation shall be organized, its requirements must be substantially complied with, otherwise it will have no legal capacity to transact any business as a corporation.' "

Similarly, Western Screw & Mfg. Co. v. Causley, 72 Ill. 531.

§ 7. In Roosevelt v. Hamblin, 199 Mass. 127, in holding that corporate franchises belonged to the incorporators before organization and afterward to the corporation, Hammond, J., said:

"In the case before us it does not appear that there were any subscribers to the stock before the date of the act of incorporation. The franchise, therefore, was held by the thirteen incorporators specifically named therein. It is necessarily implied in the act that the franchise does not remain in the incorporators after the corporation is organized; and we are of opinion that within the meaning of this statute, and for the transfer of the franchise, the corporation must be regarded as organized when the first meeting has been called, the act of incorporation accepted, the officers elected and by-laws providing for future meetings adopted, at least where there are any stockholders."

In Lechmere Bank v. Boynton, 11 Cush. (Mass.) 369, where a special charter for a bank was granted certain "petitioners and their associates," it was held that subscribers to stock other than those signing the petition for the charter were not entitled to participate in the organization of the bank. Shaw, C. J., said:

"Association ex vi termini implies agreement, compact, union of mind and purpose and action. When, as above stated, it includes those who are to come in afterward, either together with, or as successors to, the original grantees, it is by a compact between the party who desires to come in, on the one hand, and the corporation who consents to receive him on the other. One of the powers granted is to receive

associates and provide for a succession of members. But the right to receive associates is a corporate right, to be exercised, like other corporate powers, by a majority, if not otherwise regulated. But the exercise of a corporate right presupposes a previous corporate organization, and therefore until such organization, there can be no such associates, and therefore no such one can act in the organization, although invited to do so by some, or even a majority, of individual grantees."

The articles and other certificates required by law must be filed in order that a corporate entity may be legally brought into existence. (Capps v. Hastings Prospecting Co., 40 Neb. 470; Edwards v. Armour Packing Co., 190 Ill. 67; Rikhoff v. Machine Co., 68 Ind. 388.)

CHAPTER II.

CORPORATIONS DE JURE AND DE FACTO.

§ 18. Where the conditions and requirements of the law, whether general or by way of special charter, are substantially complied with in its formation, the corporation exists de jure.

"It was said in People v. Selfridge, 52 Cal. 331: 'The right to be a corporation is in itself a franchise, and to acquire a franchise under a general law the prescribed statutory conditions must be complied with.' Still, a substantial rather than a literal compliance will suffice. People v. Stockton & V. R. Co., 45 Cal. 313. Was there substantial compliance in this case? Because a substantial compliance will do it does not follow that any positive statutory requirement can be omitted on the ground that it is unimportant. They are conditions precedent to acquiring a statutory right, and none can be dispensed with by the court. What is a substantial rather than a literal compliance may be illustrated from the cases. In Ex parte Spring Valley Water Works, 17 Cal. 132, the certificate stated the place of business, but did not describe it as the 'principal place of business,' as required. The court said: 'The statement that San Francisco was the place of business would seem to imply that it was not only the principal but the only place of business.' In People v. Stockton & V. R. Co., 45 Cal. 306, the affidavit required in such cases to be attached to the certificate stated that ten per cent of the amount subscribed had been actually paid in, omitting the words 'in good faith,' which the statute required. In the certificate it was stated that more than ten per cent had been actually in good faith paid in. It was held sufficient, and it would seem that if it was actually paid in cash it must have been paid in good faith; and it was further held that payment by checks drawn against sufficient funds in a bank which was ready to accept and pay the checks was substantially payment in cash. In People v. Cheeseman, 7 Colo. 376, the acknowledgment taken by the notary omitted to state that the persons whose acknowledgments were taken were personally known to the notary. The certificate did state that the persons who signed appeared before him and acknowledged it. The statute did not prescribe what the acknowledgment should contain, and it was held a substantial compliance with the requirement, although the form prescribed for acknowledgment of deeds was

not followed. It was acknowledged. In all these cases it will be seen that the thing required was done but not literally as directed, but there was no omission of any requirement." (Temple, C., in People v. Montecito Water Co., 97 Cal. 276.)

§ 19. Where an association is not a corporation de jure, but has acted as a corporation, and enough has been done in compliance with statutory requirements so that the public is reasonably justified in dealing with it as a corporation, and it would be inequitable to treat the corporation as a nullity, such an association is regarded and held a corporation de facto, subject to be questioned as to its corporate existence only by the state in a proceeding instituted for that purpose.

In Buffalo & Alleghany R. Co. v. Cary, 26 N. Y. 75, an action on a stock subscription, Denio, C. J., said:

"The defendant contends that the plaintiff's organization is defective because the affidavit annexed to the articles of association does not contain the allegation required by the statute 'that it is intended in good faith to construct or to maintain and operate the road mentioned in the articles of association,' and that it is not, therefore, a corporation. The articles of association are in due form, and the affidavit annexed to them, while it does not come up to the requirement of the statute in the particular specified, is colorable. The articles and affidavit were filed and recorded in the office of the Secretary of State; the capital stock was subscribed and partly paid in; the route of the road was surveyed and located; the right of way obtained; a contract for the construction of the whole road entered into and liabilities incurred which have not been satisfied. This was sufficient to constitute the plaintiff a corporation de facto, so that neither it nor its stockholders can object that it is not strictly a corporation de jure. I am of the opinion that under this and similar general acts for the formation of corporations, if the papers filed by which the corporation is sought to be created are colorable, but so defective that in a proceeding on the part of the state against it, it would for that reason be dissolved, yet by acts of user under such an organization it becomes a corporation de facto, and no advantage can be taken of such defect in its constitution collaterally by any person. Any other rule, it seems to me, must be fraught with serious consequences and great public mischief. Most of the persons who subscribe in good faith for the stock do not examine to see whether all the requirements of the statute in the organ-

ization of the corporation have been complied with; and if they did examine would not probably discover a defect like the one now pointed out. The stock is sold in the market from hand to hand without any such examination. The corporation may carry on its business for years and its stock have entirely changed hands when its property may be destroyed by a trespasser, and in an action against him in the name of the corporation his only defense, 'you are not legally a corporation by reason of a defect in your constitution,' would, upon the doctrine contended for by the defendant, be successful. The doctrine of estoppel could not be applied in that case, as it has been in some cases, to counteract an erroneous decision upon the question now before us."

§ 20. In an action to foreclose a mortgage, Society Perun v. Cleveland, 43 Ohio St. 481, Owen, J., said:

"It is conceded by the city that parties who had recognized the existence of the society by their transactions with it as a supposed corporation are estopped to deny its corporate existence. But it is maintained that the city having engaged in no transactions with it is free to challenge its existence as a corporation de facto as well as de jure. The argument is that 'No case can be found where it is held that there is a corporation de facto against persons who have in no way recognized its existence as a corporation,' and that 'The notion of a de facto corporation is based on the doctrine of estoppel; when estoppel cannot be invoked there can be no de facto corporation.'

"The theory that a de facto corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation either in reason or authority. A de facto corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, a corporation.

"It is a self-evident proposition that a contract cannot be made with a corporation unless the corporation be in existence at the time. A real contract with an imaginary corporation is as impossible in the nature of things as a real contract with an imaginary person. It is essential, therefore, in order to establish the existence of a contract with a corporation, to show that the corporation was in existence, at least de facto, at the time the contract was made. (Morawetz on Private Corporations, sec. 137.)

"It is bound by all such acts as it might rightfully perform as a corporation de jure. Where it has attempted in good faith to assume corporate powers; where its proceedings in that behalf are colorable and are approved by those officers of the state who are authorized to act in that regard; where it has honestly proceeded for a number of years, without interference from the state, to transact business as a corporation, has been reputed and dealt with as a duly incorporated body, and valuable rights and interests have been acquired and transferred by it, no substantial reason is suggested why its corporate existence in a suit involving such transactions should be subject to attack by any other party than the state, and then only when it is called upon, in a direct proceeding for that purpose, to show by what authority it assumes to be a corporation."

Nelson, J., in Lessee of Frost v. Frostburg Coal Co., 24 How. (U. S.) 283, said:

"The defendants were made a corporation by the charter, the persons named in it constituting the corporate body, clothed with the powers and privileges conferred upon it, and were capable of taking and holding real estate; and, second, even if it were otherwise and some irregularities occurred in the organization of the company, inasmuch as no act made a condition precedent to the existence of the corporation has been omitted or its nonperformance shown, a party dealing with the company is not permitted to set up the irregularity. The courts are bound to regard it as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the government that created it."

LIABILITY OF STOCKHOLDERS OF DE FACTO CORPORATION.

§ 21. Though enough has been done to constitute a corporation de facto, yet the franchise rights recognized as existing de facto may be forfeited by quo warranto proceedings on behalf of the state. (Cook, 6th ed., § 231.) While in the earlier decisions and books there was much diversity upon the point whether stockholders of de facto corporations were liable as partners, as if no corporation had been formed (Cook, 1st ed., § 233, 17 L. R. A. 549n), the general rule now is established that if enough has been done to constitute a de facto

corporation, the stockholders are liable only as such and not as partners.

In Whitney v. Wyman, 101 U. S. 392, in holding that the defendants in that case, who, as officers, directors and stockholders of a de facto corporation, had entered into a contract with the plaintiff, in the name of the de facto corporation, were not individually liable on the contract, Swayne, J., in the opinion of the court, said:

"The court instructed the jury, in substance, that the letter of the Prudential Committee of February 1, 1870, bound the corporation and not the defendants, if there was then a corporation, and the defendants were authorized by it to give the order, and that if the corporation had acted as such and exercised its franchises, then it was a corporation de facto, and that in such case any irregularity in its organization was immaterial.

"The plaintiff excepted to these instructions, and took numerous other exceptions in the course of the trial, which are set forth in the record.

"The jury found for the defendants; and judgment having been entered for them, Whitney removed the case here. . . . .

"Looking at the letter of the defendants of the 1st of February, 1869, and the answer of the plaintiff of the 10th of that month, we cannot doubt as to the understanding and meaning of both parties with respect to the point in question.

"The former advised the latter of the progress made in organizing the corporation; that the order was given by the direction of its officers, and the letter is signed by the writers as the 'Prudential Committee of the Grand Haven Fruit-basket Co.,' which was the name in full of the corporation. The plaintiff addressed his reply to the 'Grand Haven Fruit-basket Company,' thus using the name of the corporation as the party with whom he knew he was dealing, and omitting the names of the defendants, and their designation as a committee, according to the style they gave themselves in their letter.

"It seems to us entirely clear that both parties understood and meant that the contract was to be, and in fact was, with the corporation, and not with the defendants individually.

"The agreement thus made could not be afterward changed by either of the parties without the consent of the other. (Utley v. Donaldson, 94 U. S. 29.)

"But it is said the corporation at the date of these letters was forbidden to do any business, not having then filed its articles of association, as required by the statute.

"To this objection there are several answers.

"The corporation subsequently ratified the contract by recognizing and treating it as valid.

"This made it in all respects what it would have been if the requisite corporate power had existed when it was entered into. (Angell & Ames, Corp., sec. 804 and note.)

"The corporation having assumed by entering into the contract with the plaintiff to have the requisite power, both parties are estopped to deny it. (Id., sec. 635 and note.)

"The restriction imposed by the statute is a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one but the state could object. The contract is valid as to the plaintiff, and he has no right to raise the question of its invalidity. (National Bank v. Matthews, 98 U. S. 621.)

"The instruction given by the court to the jury with respect to acts of user by the corporation in proof of its existence was correct. If there was any error, it was in favor of the plaintiff. (Angell & Ames, Corp., sec. 635.)" (Morawetz, § 748; Rutherford v. Hill, 22 Or. 218, 17 L. R. A. 549; Love v. Ramsay, 139 Mich. 47; Webb v. Rockefeller, 195 Mo. 57; Larned v. Beal, 65 N. H. 184; Doty v. Patterson, 155 Ind. 60; Crowder v. Sullivan, 128 Ind. 486; Curtis v. Meeker, 169 Ill. 233; Johnson v. Okerstrom, 70 Minn. 303; Vanneman v. Young, 52 N. J. L. 403; Bates v. Wilson, 14 Colo. 140; Snider's Sons Co. v. Troy, 91 Ala. 224; Mokelumne Hill Min. Co. v. Woodbury, 14 Cal. 424; Tarbell v. Page, 24 Ill. 46; Demarest v. Flack, 128 N. Y. 205; Cook, 6th ed., § 233.)

But where no law authorizes the attempted corporation, or if a law exists under which a corporation might be formed, but no substantial bona fide colorable attempt has been made by the association to comply with the law, or fraud or legal wrongdoing taints the attempted formation, those stockholders or members responsible will be held liable as partners. (Eaton v. Walker, 76 Mich. 579; Booth v. Wonderly, 36 N. J. L. 250; Hill v. Beach, 12 N. J. Eq. 31; McGrew v. Exchange, 85 Tenn. 572; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104; Bigelow v. Gregory, 73 Ill. 197; Medill v. Collier, 16 Ohio St. 599; Hurt v. Salisbury, 55 Mo. 310; Ferris v. Thaw, 72 Mo. 446; Garnett v. Richardson, 35 Ark. 144, Abbott v. Omaha Smelt. & Ref. Co., 4 Neb. 416; McVicker v. Cone, 21 Or. 353; Coleman v. Coleman, 78 Ind. 344; New York etc. Bank v. Crowell, 177 Pa. 313. For further authorities, see Cook, 6th ed., §§ 230-243; 17 L. R. A. 549.)

CHAPTER III.

CHARTER POWERS.

§ 32. The creation of a corporation is a franchise grant—a delegation of governmental power to the body corporate to act and govern itself under by-laws and otherwise, and is strictly construed.

"The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in and to be exercised by the body corporate as such are the franchises of the corporation. The latter has no power to dispose of the franchise of its members which may survive in the mere fact of corporate existence after the corporation has parted with all its property and all its franchises." (Matthews, J., in Memphis R. R. Co. v. Commissioners, 112 U. S. 619.)

In holding that a state could not tax franchises granted by Congress without the consent of Congress, Bradley, J., in California v. Pacific R. R. Co., 127 U. S. 1, 40, said:

"Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the state. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the state of California can neither take them away nor destroy nor abridge them nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company situated within the state. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. What is a franchise? Under the English law, Blackstone defines it as 'a royal privilege or branch of the king's prerogative subsisting in the hands of a subject.' 2 Bl. Com. 37. Generalized and devested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration either by the government directly or by public agents acting

under such conditions and regulations as the government may impose in the public interest and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry or railroad, or charge tolls for the use of the same, without authority from the legislature direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

§ 33. The express statutory authority under and by which a corporation is created and exists is termed the charter of the corporation. Where the incorporation is by special law, the charter is the special act incorporating the company and its amendments; where the incorporation is by general law, the charter of the company is the general law and the certification by the duly authorized public officer showing the scope and character of the company in the compliance with, and acceptance of, that general law by the incorporators of the company.

"This charter of the Northeastern Company as it existed in 1863 was based upon the two acts of the legislature passed in 1851 and 1855, respectively. The first act was entitled an 'act to incorporate' the Northeastern Company. The latter act was entitled 'an act to amend the charter of the Northeastern Company.' A charter in the sense here used is an instrument or authority from the sovereign power bestowing rights or privileges; as it is briefly expressed, it is an act of incorporation. Such was the obvious understanding of the word by the legislature of South Carolina. The first act was expressed as creating the incorporation of the company. The second, using a synonymous expression, purported to amend its charter. The words 'charter' and 'act of incorporation' were used convertibly. Whether it be said that the rights and privileges conferred upon the Northeastern as they stood in 1863 existed in its charter or were derived from its incorpo-

ration amounts to the same thing. We have no doubt that all of them were intended to be granted to the Cheraw Company by the act of that year. The charter or incorporation of 1851 had been amended in 1855 and by an act which purported in its title not to create an original authority, but by amending the original charter to bestow additional powers upon the company. After the passage of the amended act the Northeastern was in law as if it had originally been chartered with all the rights, powers and privileges conferred upon it by the act of 1855." (Hunt, J., in Humphrey v. Pegues, 83 U. S. 248.)

§ 34. The principle is not different in cases of incorporation under general law.

"All these statutes [general incorporation laws] were complete as laws when they came from the hands of the legislature, and did not depend for their force and efficacy upon the action or will of any other power. It is true that they could only take effect upon the happening of some event, such as the filing the petition or declaration and giving publicity to the purpose of the association in the mode prescribed by the act. But if this were a good reason for regarding these statutes as invalid, then how few corporations could abide the test! For it requires the acceptance of the charter to create a corporate body, for the government cannot compel persons to become an incorporated body without their consent, and this consent, either express or implied, is generally subsequent in point of time to the creation of the charter. And yet no charter that we are aware of has been adjudged invalid because the law creating it and previously defining its powers, rights, capacities and liabilities did not take effect until the acceptance of the corporate body, or at least a majority of them, was signified." (Lumpkin, J., in Franklin Bridge Co. v. Wood, 14 Ga. 80.)

The corporation comes into existence on acceptance of the express statutory authority constituting the charter.

"The simple enactment of the charter for the corporation by the legislature did not create the corporation. It required one act on the part of the persons named in the charter to do that, viz., acceptance of the charter enacted. Says Grant in his work on Corporations, vide page 13: 'Nor can a charter be forced on any body of persons who do not choose to accept it'; and again, at page 18, he says: 'The fundamental rule is this: no charter of incorporation is of any effect until it is

accepted by a majority of the grantees or persons who are to be the corporators under it.'" (Perkins, J., in State v. Dawson, 16 Ind. 40.)

§ 35. The rights and powers of a corporation arise expressly or by necessary implication out of its charter. The charter is a contract which by the constitution of the United States and as well by the constitutions of certain states may not be impaired in its obligations by any state law, unless the power of amendment, alteration or repeal is reserved by the state creating the corporation and prior thereto. The charter is construed strictly against the corporation to the extent that the right or power must affirmatively appear, either expressly or by necessary implication.

"The whole doctrine of vested rights as applied to the charters of corporations is based upon the Dartmouth College Case, 4 Wheat. 518, in which the broad proposition was laid down that such charters were contracts within the meaning of the constitution, and hence that an act of the state legislature altering a charter in any material respect was unconstitutional and void. . . . . Subsequent cases have settled the law that wherever property rights have been acquired by virtue of a corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts and beyond the reach of destructive legislation. Even before the Dartmouth College Case was decided it was held by this court that grants of land made by the crown to colonial churches were irrevocable, and that property purchased by or devised to them prior to the adoption of the constitution could not be diverted to other purposes by the states which succeeded to the sovereign power of the colonies. Terrett v. Taylor, 9 Cranch, 43; Town of Pawlet v. Clark, 9 Cranch, 292; Society for Propagation of the Gospel v. New Haven, 8 Wheat. 464.

§ 36. "Indeed, the sanctity of charters vesting in grantees the title to lands or other property has been vindicated in a large number of cases. Davis v. Gray, 16 Wall. 203; Fletcher v. Peck, 6 Cranch, 87, 137; Moore v. Robbins, 96 U. S. 530; United States v. Schurz, 102 U. S. 378; Noble v. Union River Logging R. R., 147 U. S. 165. This court has had, perhaps, more frequent occasion to assert the inviolability of corporate charters in cases respecting the power of taxation than in any other, and in a long series of decisions has held that a

clause imposing certain taxes in lieu of all other taxes or of all taxes to which the company or stockholders therein would be subject is impaired by legislation raising the rate of taxation or imposing taxes other than those specified in the charter. Thus, in State Bank of Ohio v. Knoop, 16 How. 369, it was held that where by a general banking law it was provided that a certain percentage of dividends should be set off for the use of the state and should be in lieu of all taxes to which the company or stockholders therein would otherwise be subjected, this was a contract fixing permanently the amount of taxation, and that legislation could not thereafter increase it. In this connection it was said by Mr. Justice McLean: 'Every valuable privilege given by the charter and which conduced to an acceptance of it and an organization under it is a contract which cannot be changed by the legislature where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise and necessary to the business of the bank cannot, without its consent, become a subject for legislative action.' To the same effect are New Jersey v. Wilson, 7 Cranch, 164; Gordon v. Appeal Tax Court, 3 How. 133; Dodge v. Woolsey, 18 How. 331; Jefferson Branch Bank v. Skelly, 1 Black, 436; McGee v. Mathis, 4 Wall. 143; Home of the Friendless v. Rouse, 8 Wall. 430; Wilmington R. R. v. Reid, 13 Wall. 264; Humphrey v. Pegues, 16 Wall. 244; Farrington v. Tennessee, 95 U. S. 679; New Jersey v. Yard, 95 U. S. 104; Asylum v. New Orleans, 105 U. S. 362. If, however, the charter contain a reservation of an unlimited power to alter, amend or repeal, the legislature may take away an immunity from taxation. Tomlinson v. Jessup, 15 Wall. 454. Within the same principle are grants of an exclusive right to supply gas or water to a municipality or to occupy its streets for railway purposes. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; New Orleans Water Works v. Rivers, 115 U. S. 674; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683; St. Tammany Water Works v. New Orleans Water Works, 120 U. S. 64; Boston & Lowell R. R. v. Salem & Lowell R. R., 2 Gray, 1.

§ 37. "So if a company be chartered with power to construct and maintain a turnpike, erect toll-gates and collect tolls, such franchise is protected by the constitution. Turnpike Co. v. Illinois, 96 U. S. 63; Monongahela Navigation Co. v. United States, 148 U. S. 312. If it be provided in the charter of a bank that the bills and notes of the institution shall be re-

ceived in payment of taxes or of debts due to the state, such undertaking on the part of the state constitutes a contract between the state and holders of the notes which the state is not at liberty to break, although notes issued after the repeal of the act are not within the contract and may be refused. Woodruff v. Trapnall, 10 How. 190; Paup v. Drew, 10 How. 218; Furman v. Nichol, 8 Wall. 44; Keith v. Clark, 97 U. S. 454; Antoni v. Greenhow, 107 U. S. 769; Poindexter v. Greenbow, 114 U. S. 270. And in Planters' Bank v. Sharp, 6 How. 301, where a bank was chartered with the usual powers to receive money on deposit, discount bills of exchange and notes, and to make loans, and in the course of its business the bank discounted and held promissory notes, and the legislature then passed a law declaring that it should not be lawful for any bank to transfer by indorsement or otherwise any note, bill receivable, or other evidence of debt, it was held that the statute conflicted with the constitution, and was void. It was said in this case that 'a power to dispose of its notes as well as other property may well be regarded as an incident to its business as a bank to discount notes which are required to be in their terms assignable as well as an incident to its right of holding them and other property, when no express limitation is imposed upon the power to transfer them.' In each of the above cases, however, the title to property had either become vested in the grantee by operation of law or the exercise of the power granted was so far necessary to the full enjoyment of the main object of the charter that persons subscribing to the stock might be presumed to take into consideration and be influenced in their subscriptions by the fact that the corporation was endowed with those privileges during the continuance of the charter.

§ 38. "Such limitations, however, upon the power of the legislature must be construed in subservience to the general rule that grants by the state are to be construed strictly against the grantees, and that nothing will be presumed to pass except it be expressed in clear and unambiguous language. As was said by Mr. Justice Swayne in Fertilizing Co. v. Hyde Park, 97 U. S. 659, 666: 'The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court.' Hence an

exclusive right to enjoy a certain franchise is never presumed, and unless the charter contain words of exclusion, it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed. This principle was laid down at an early date in the case of the Charles River Bridge v. Warren Bridge, 11 Pet. 420, and has been steadily adhered to ever since. Turnpike Co. v. State, 3 Wall. 210; Providence Bank v. Billings, 4 Pet. 514; Pennsylvania R. R. v. Miller, 132 U. S. 75. If, however, there be an exclusive provision, as, for instance, in the charter of a bridge company that it shall not be lawful for any person to erect another bridge within a certain distance of the bridge authorized, this constitutes an inviolable contract. The Binghampton Bridge, 3 Wall. 51. But even in such cases if the second charter be for a similar franchise, but to be exercised in a substantially different manner, the exclusive right conferred by the first charter is held not to be violated; as, for instance, if the first charter be for an ordinary bridge and the second for a railway viaduct impossible for man or beast to cross except in railway cars. Bridge Proprietors v. Hoboken Co., 1 Wall. 116. So if the first franchise be for the sole privilege of supplying a city with water from a designated source, it is not impaired by a grant to another party of the privilege to supply it with water from a different source. Stein v. Bienville Water Supply Co., 141 U. S. 67.

"Upon a similar principle it was held in Tucker v. Ferguson, 22 Wall. 527, that a tax upon lands owned by a railway company and not used, nor necessary, in working the road and in the exercise of its franchise, was not unlawful, though the charter had provided for a certain tax upon the railroad company, and had enacted that such tax should be in lieu of all other taxes to be imposed within the state. See, also, West Wisconsin Ry. v. Supervisors, 93 U. S. 595.

§ 39. "Nor does it follow from the fact that the contract evidenced by the charter cannot be impaired that the power of the legislature over such charter is wholly taken away, since statutes which operate only to regulate the manner in which the franchises are to be exercised and which do not interfere substantially with the enjoyment of the main object of the grant are not open to the objection of impairing the contract. A familiar instance of this class of legislation is that enacted under what is known as the police power. In virtue of this the state may prescribe regulations contributing to the comfort, safety and health of passengers, the protection of the

public at highway crossings or elsewhere, the security of owners of adjacent property, by requiring the track to be fenced, and such appliances to be annexed to the engines as shall prevent the communication of fire to neighboring buildings. Cooley Prin. Const. Law, 321. This power, as was said by Mr. Justice Miller in the Slaughter-house Cases, 16 Wall. 36, 62, is and must be, from its very nature, incapable of any very exact definition or limitation. 'Upon it depends the security of social order, the life and health of the citizen, the comfort of existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.' The following cases show to what extent and for what purposes this power may be exercised. Slaughter-house Cases, 16 Wall. 36; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Beer Co. v. Massachusetts, 97 U. S. 25; Patterson v. Kentucky, 97 U. S. 501; Barbier v. Conolly, 113 U. S. 27; Charlotte Columbia etc. R. R. v. Gibbes, 142 U. S. 386; Lawton v. Steele, 152 U. S. 133; Eagle Ins. Co. v. Ohio, 153 U. S. 446. And so important is this power and so necessary to the public safety and health, that it cannot be bargained away by the legislature, and hence it has been held that charters for purposes inconsistent with a due regard for the public health or public morals may be abrogated in the interests of a more enlightened public opinion. Stone v. Mississippi, 101 U. S. 814; Phalen v. Virginia, 8 How. 163, 168.

"In obedience to the same principle it has always been held that the legislature may repeal laws authorizing municipal subscription to railways, though such laws were in existence at the time the railway was chartered and may be supposed to have influenced the promoters and stockholders of the road in undertaking its construction. . . . . The contract protected by this clause must also be founded upon a good consideration. If it be a mere nude pact, a bare promise to allow a certain thing to be done, it will be construed as a revocable license.

§ 40. "A vested right is defined by Fearne in his work upon Contingent Remainders as 'an immediate fixed right of present or future enjoyment'; and by Chancellor Kent as 'an immediate right of present enjoyment or a present fixed right of future enjoyment.' 4 Kent Com. 202. It is said by Mr. Justice Cooley that 'rights are vested in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things

until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.' Principles of Const. Law, 332.

"As applied to railroad corporations, it may reasonably be contended that the term extends to all rights of property acquired by executed contracts, as well as to all such rights as are necessary to the full and complete enjoyment of the original grant or of property legally acquired subsequent to such grant. If, for example, the legislature should authorize the construction of a certain railroad, and by a subsequent act should take away the power to raise funds for the construction of the road in the usual manner by a mortgage or the power to purchase rolling stock or equipment, such acts might perhaps be treated as so far destructive of the original grant as to render it valueless, although there might in neither case be an express repeal of any of its provisions. Sala v. New Orleans, 2 Woods, 188.

"But where the charter authorizes the company in sweeping terms to do certain things which are unnecessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked if a possible exercise of such power is found to conflict with the interests of the public." (Brown, J., in Pearsall v. Great Northern Ry., 161 U. S. 646.)

§ 41. In construing a provision in a charter of a railroad to unite with other roads, Brown, J., in Louisville & Nashville R. R. Co. v. Kentucky, 161 U. S. 677, said:

"In construing this section we are bound to bear in mind the general rule so often affirmed by this court, that all doubts with regard to the authority granted in a corporate charter are to be resolved against the corporation, and that a surrender of the power of the legislature in any matter of public concern must never be presumed from uncertain or equivocal expressions. Dubuque & Pacific R. R. v. Litchfield, 23 How. 66, 88; Delaware Railroad Tax, 18 Wall. 206, 225; Bailey v. Maguire, 22 Wall. 215; Slidell v. Grandjean, 111 U. S. 412; Belmont Bridge v. Wheeling Bridge, 138 U. S. 287."

Respecting the reservation of the right to amend, alter or repeal the charter, Field, J., in Tomlinson v. Jessup, 15 Wall. 454, said:

"The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the state."

§ 42. While charters are construed strictly as above set forth, nevertheless rights and powers necessary to the exercise of those expressly given are implied.

"Anciently, it seems to have been held that corporations could not do anything without deed. 13 Hen. VIII, 12; 4 Hen. VII, 6; 7 Ibid. 9. Afterward, the rule seems to have been relaxed, and they were, for convenience sake, permitted to act in ordinary matters without deed; as to retain a servant, cook, or butler (Plowd. 91b; 2 Saund. 305); and gradually this relaxation widened to embrace other objects. Bro. Corp. 51; 3 Salk. 191; 3 Lev. 107; Moore, 512. At length, it seems to have been established that though they could not contract directly, except under their corporate seal, yet they might, by mere vote or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts within the scope of his authority would be binding on the corporation. Rex v. Bigg, 3 P. Wms. 419. And courts of equity in this respect, seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation and entered in the corporation books, although not under the corporate seal. 1 Fonbl. 305 (Phila. ed.), note o. The sole ground upon which such an agreement can be enforced must be the capacity of the corporation to make an unsealed contract. . . . .

"The technical doctrine that a corporation could not contract except under its seal, or, in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in their name without seal, it was impossible to support it, for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly, it would seem to be a sound rule of law that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law and all benefits conferred at their request raise implied promises for the enforcement of which an action may well lie. And it seems to the court that adjudged cases fully support the position. Bank of England

v. Moffat, 3 Bro. C. C. 262; Rex v. Bank of England, 2 Doug. 524, and note; Gray v. Portland Bank, 3 Mass. 364; Worcester Turnpike Corp. v. Willard, 5 Ibid. 80; Gilmore v. Pope, 5 Mass. 491; Andover & Medford Turnpike Corp. v. Gould, 6 Mass. 40.

§ 43. "In the case before the court these principles assume a peculiar importance. The act incorporating the Bank of Columbia (act of Maryland, 1793, c. 30) contains no express provision authorizing the corporation to make contracts. And it follows that upon principles of the common law, it might contract under its corporate seal. No power is directly given to issue notes not under seal. The corporation is made capable to have, purchase, receive, enjoy and retain lands, tenements, hereditaments, goods, chattels and effects of what kind, nature or quality soever, and the same to sell, grant, demise, alien or dispose of; and the board of directors are authorized to determine the manner of doing business and the rules and forms to be pursued; to appoint and pay the various officers, and dispose of the money or credit of the bank in the common course of banking for the interest and benefit of the proprietors. Unless, therefore, a corporation, not expressly authorized, may make a promise, it might be a serious question how far the bank notes of this bank were legally binding upon the corporation, and how far a depositor in the bank could possess a legal remedy for his property confided to the good faith of the corporation. In respect to insurance companies also, it would be a difficult question to decide whether the law would enable a party to recover back a premium the consideration of which had totally failed. Public policy, therefore, as well as law, in the judgment of the court, fully justifies the doctrine which we have endeavored to establish." (Story, J., in Bank of Columbia v. Patterson, 7 Cranch, 298.)

"Now, I am of opinion that though power to make laws [by-laws] is given by special clause to all incorporations, yet it is needless; for I hold it to be included by law in the very act of incorporating as is also the power to sue, to purchase and the like. For as reason is given to the natural body for the governing of it, so the body corporate must have laws, as a politic reason to govern it; but those laws must ever be subject to the general law of the realm as subordinate to it. And therefore, though there be no proviso for that purpose, the law supplies it." (Hobart, C. J. (?), in Norris v. Stops, 1614–1625 (?), Hobart's Reports, p. 211a.)

§ 44. "The remaining consideration relates to the authority of Sampson to execute the mortgage in behalf of the corporation. It is not necessary that the authority should be given by a formal vote. Such an act by the president and general manager of the business of the corporation, with the knowledge and concurrence of the directors, or with their subsequent and long-continued acquiescence, may properly be regarded as the act of the corporation. Authority in the agent of a corporation may be inferred from the conduct of its officers or from their knowledge and neglect to make objection, as well as in the case of individuals." (Wells, J., in Sherman v. Fitch, 98 Mass. 59.)

"To corporations, however erected, there are said to be certain incidents attached without any express words or authority for this purpose; such as the power to plead and be impleaded, to purchase and alien, to make a common seal and to pass by-laws. Com. Dig., 'Franchise,' F. 10, 13." (Story, J., in Bank v. Dandridge, 12 Wheat. 63, p. 66.)

"The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited. Thomas v. Railroad Co., 101 U. S. 71; Attorney General v. Great Eastern Ry. Co., 5 App. Cas. 473; Davis v. Old Colony R. R. Co., 131 Mass. 258." (Gray, J., in Green Bay etc. R. R. Co. v. Union etc. Co., 107 U. S. 98.)

"Conceding the rule applicable to all statutes that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." (Miller, J., in Thomas v. Railroad Co., 101 U. S. 71, p. 82.)

"It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." (Nelson, J., in Minturn v. Larue et. al., 23 How. 435, p. 436.)

§ 45. In Perrine v. Chesapeake & Delaware Canal Co., 9 How. 171, in holding that the canal company had no right to demand tolls except as specified and enumerated in the charter of the company, Taney, C. J., said:

"No toll is given on the vessels themselves, except only when they have no commodities on board, or not sufficient to yield a toll of four dollars. Passengers are not mentioned in the enumeration, nor is any toll given upon a vessel on account of the persons or passengers it may have on board.

"Now, it is the well-settled doctrine of this court that a corporation created by statute is a mere creature of the law, and can exercise no powers except those which the law confers upon it, or which are incident to its existence. (Head and Armory v. The Providence Ins. Co., 2 Cranch, 127; Dartmouth College v. Woodward, 4 Wheat. 636; Bank of the United States v. Dandridge, 12 Wheat. 64; Charles River Bridge v. Warren Bridge, 11 Pet. 544; Bank of Augusta v. Earle, 13 Pet. 587.) And as no power is given to this corporation to demand toll from passengers, or from vessels on account of the passengers on board, it is very clear that no such power can be exercised, and no such toll lawfully taken.

"The principle above stated is also an answer to the argument which places the right of the company to demand toll upon the ground that it is the absolute owner of the works and of the land it occupies, and insists that it may therefore, like any other owner, demand compensation from any person passing over its property. The error of this argument consists in regarding the title of the company to the property in question as derived to them upon common-law principles, and measuring their rights by the rules of the common law. The corporation has no rights of property except those derived from the provisions of the charter, nor can it exercise any powers over the property it holds except those with which the charter has clothed it. It holds the property only for the purposes for which it was permitted to acquire it—that is, to effectuate the objects for which the legislature created it. And whether it may lawfully demand compensation from a person whom it permits to pass over its property must depend upon the language of the charter, and not upon the rules of the common law.

"Certainly in this instance the power is not conferred in express terms, nor are any words used from which it can reasonably be implied. It would, indeed, be a most unusual one, and we believe without precedent in any charter here-

tofore granted by any state in this Union. For the power claimed is the right to demand toll from every citizen who passes through the canal, and to fix the amount at the discretion of the corporation. In form, it is true, the demand is made on the owner of the vessel engaged in transporting passengers; but it is immaterial to the passenger whether he is charged with the toll in the increased price of his passage or by a direct tax upon himself. In either case the result is the same, and the power exercised is the same. Such an unlimited power to levy contributions on the public, and one so inconsistent with the ordinary course of legislation upon that subject, and, we may add, so unjust and injurious to the public, ought not to be sustained in a court of justice, unless it is conferred in plain and express words. It should not be inferred where the slightest doubt could arise and the words are capable of any other construction; and still less can it be inferred in a charter like this, where the toll granted upon goods and property of every kind is so carefully specified and fixed in the law, and the charter altogether silent in relation to passengers. The contrary inference would seem to be irresistible."

§ 46. While articles of association filed under a general law are commonly termed the charter, they cannot assume any rights or powers not within the statute.

"It is argued that the articles of association under the Oregon law, and the memorandum of association, under the Companies' Acts of Great Britain, are themselves the equivalent of an act of incorporation by the legislature, and that whatever is found as a grant of power or description of the purpose of the company, set forth in such articles or memorandum, is tantamount to a legislative act. A phrase in the opinion of the court in Thomas v. Railroad Co., supra, is cited as supporting this proposition, namely, 'The memorandum of association, as Lord Cairns said, stands in the place of a legislative charter.' But what was meant both by Lord Cairns and by this court, was that anything not claimed, granted or described in such instrument in relation to the powers and business of the corporation could not be held to be a part of them by construction; in other words, that its powers could not exceed those enumerated therein. It was necessarily implied in such a remark that anything in such articles or memorandum not warranted by the statutes in question authorizing the formation of corporate bodies was void for want of authority.

"Of course, any authority for the exercise of corporate powers, derived from the laws of Oregon, must be in accord with the constitution of that state and its statutes upon that subject. The constitutional provision, above quoted, that corporations shall not be created by special laws, but may be formed under general laws, implies that no private corporation could be created thereafter until such general law had been enacted, and that it thereupon became the fundamental law of the state in regard to all corporations formed under it. It is idle to say, therefore, that any corporation could assume to itself powers of action by the mere declaration in its articles or memorandum that it possessed them." (Miller, J., in Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S. 1, p. 25.)

ACQUIRING AND HOLDING OF REAL PROPERTY BY CORPORATIONS.

§ 47. The right or power of a corporation to acquire and hold land or real property involves several questions:

(1) The implied power incident to a corporation as such;

(2) The extent of statutory authority, prohibition or limitation;

(3) In what cases the individual may question the right.

In view of the fact that, historically, the main purpose of a corporation has ever been regarded as that of holding property, that object being the original cause of its adoption in England, the power to hold real property has always been held both in England and America as being naturally incident to a corporation, irrespective of express grant, and subject only to statutory prohibition or limitation.

§ 48. In First Parish in Sutton v. Cole, 3 Pick. (Mass.) 232, in holding a devise to a parish for the use of schools valid, Parker, C. J., said:

"By the common law it was the right of corporations to take and hold property, both real and personal, to their own use, unless restricted by the terms of their charter, or by immemorial usage in such corporations as exist by prescription. This common-law right has been taken away in England by the Statutes of Mortmain, so that now corporations can take and hold real estate only by license from the King or

by act of Parliament, if they derive their power from that source. 1 Bl. Com. 475, Christian's note; Co. Lit. 2. These Statutes of Mortmain seem never to have been re-enacted, adopted or practiced upon in this country, but still it may be inferred from the special power given to various corporations by acts of the legislature to hold real estate to a certain limited extent, that corporations created for specific objects would not have the power to take and hold real estate for purposes wholly foreign to those objects."

In Nicoll v. The New York & Erie R. R. Co., 12 N. Y. 121, in holding that a railroad company incorporated for a limited time could take a fee in lands, Parker, J., said:

"The company had ample power to purchase lands. It was a power incident at common law to all corporations unless they were especially restrained by their charters or by statute. (2 Kent, 281; Co. Litt. 44a, 300b; 1 Kyd's Corp., 76, 78, 108, 115; 3 Pick. 239.)"

To the same effect are: The Banks v. Poitiaux, 3 Rand. (Va.) 136; Widow etc. of Reynolds v. Conners-Stark Co., 5 Ohio, 204; Lathrop v. Commercial Bank, 8 Dana (Ky.), 114; Thompson v. Waters, 25 Mich. 214; Mallet v. Simpson, 94 N. C. 37; People v. La Rue, 67 Cal. 526; Kelly v. People's Trans. Co., 3 Or. 189.

§ 49. Corporations having, therefore, as a natural incident the power to acquire and hold real estate, the extent of their power becomes a question of statutory restriction, express or implied.

In England, the acquisition and holding of lands by corporations is subjected to the stringent restrictions of the Acts of Mortmain, but these statutes have not been re-enacted in this country, except in Pennsylvania and in New York, to the extent of the prohibition contained in the Statute of Wills.

Statutory authority to acquire and hold land is now given by the corporation laws of the states.

Statutory restrictions of the power of corporations to acquire and hold land are of three classes: (1) Express prohibitions as contained in the Mortmain Acts (In re McGraw, 111 N. Y. 66); (2) Express statutory limitations where authority is given by statute to a corporation or class of cor-

porations to acquire and hold land to an amount specified (Hubbard v. Worcester Art Museum (Mass.), 80 N. E. 490); (3) Implied statutory limitations confining the acquisition and holding of lands by corporations to those required for the corporate purposes specified in the charter and to the extent reasonably necessary for those purposes. (Sutton v. Cole, 3 Pick. (Mass.) 232; Riley v. Rochester, 9 N. Y. 64; National Home Bldg. etc. Assn. v. Home Sav. Bank, 181 Ill. 35 (citing authorities); Thweatt v. Bank of Hopkinsville, 81 Ky. 1; Pacific R. R. Co. v. Seely, 45 Mo. 212; State v. Newark, 25 N. J. L. 315; Case v. Kelly, 133 U. S. 1; Waldo v. Chicago etc. R. Co., 14 Wis. 625; Occum v. Sprague Mfg. Co., 34 Conn. 529; First M. E. Church v. Dixon, 178 Ill. 260; People v. Pullman Palace Car Co., 175 Ill. 125.)

§ 50. The question whether the individual may question the right or power of the corporation to acquire and hold land has given rise to much diversity in the decisions. Where courts have construed the corporation to be utterly without power to take or hold land, such attempted taking has been held void, and subject to question by any individual interested. Thus, in New York, the statute prohibits a corporation from taking by devise, except to the extent authorized by its charter, and it is held that a devise to a corporation in excess of its limit authorized by statute is void, and may be questioned by the individual interested. (In re McGraw, 111 N. Y. 66.) In that case, in holding that the heirs and next of kin of the testator could defeat a gift to Cornell University in excess of the amount authorized by charter, Peckham, J., said:

"A devise to a corporation which is forbidden to take (or forbidden to hold, if the word, under the circumstances of the case, is construed to include a taking also) does not, therefore, give a title subject to the right of some superior to claim a forfeiture of the land; but if it be in violation of a statute, I think the devise is void, and the land descends to the heir or residuary devisee."

Similarly in Davidson College v. Chambers, 56 N. C. 253; Wood v. Hammond, 16 R. I. 98; House of Mercy v. Davidson,

90 Tex. 529; Cromil v. Louisville Orphans' Home Soc., 3 Bush (Ky.), 365; Heiskell v. Lodge, 87 Tenn. 668.

§ 51. And in many jurisdictions where a corporation has attempted to acquire land for a purpose not authorized by its charter, it has been held a nullity and void, and that an individual interested and not for some reason estopped could raise the question and defeat such acquisition and holding. (Occum Co. v. Sprague Mfg. Co., 34 Conn. 529; National Home etc. Assn. v. Home Sav. Bank, 181 Ill. 35; Rivanna Nav. Co. v. Dawsons, 3 Gratt. (Va.) 19; Thweatt v. Bank of Hopkinsville, 81 Ky. 1.)

§ 52. Where, however, there is no prohibition, the distinctions are pointed out by the supreme court of Massachusetts in the case of Hubbard v. Worcester Art Museum, 80 N. E. 490, where it was held that a devise to a corporation in excess of the amount authorized by the charter was not for that reason necessarily void. Knowlton, C. J., in delivering the opinion of the court, said:

"Under the feudal system, when land was given to a corporation, the chief lords of whom the land was held and the King, as ultimate chief lord, lost their chances of escheat and various other rights and incidents of military tenure. During the Middle Ages the accumulation of land in the ecclesiastical corporations was so great as to be thought a national grievance. Hence the English Mortmain Acts, which go back to Magna Charta and Stat. 9, Henry III, chapter 36, and which have continued, with various modifications, to this day. (See Stat. 7, Edward I, c. 2; Stat. 15, Richard II, c. 5; Shelford Mortmain, 2, 6, 8, 16, 25, 34, 39, 809, 812; Tyssen on Charitable Bequests, 2, 383.) Under these acts the alienations were not void, so as to let in the grantors and their heirs; but they merely operated as a forfeiture which gave a right to the mesne lord and the King to enter after due inquest. This right to enter was often waived by a license in Mortmain. (See citations above and Tyssen on Charitable Bequests, 383; Stat. 7 & 8, William III, c. 37.) In form, these licenses commonly authorized a holding of property 'not exceeding' a certain value. In later years this authority sometimes has been inserted in the charter, and this limited power of purchase has, it is said, been

exceeded by almost all corporations. (Shelford Mortmain, 55. See, also, pages 10, 44, 49, 56, 891; Tyssen on Charitable Bequests, 393, 394, 396.)

"Another act, Stat. 9, George II, chapter 36, which is usually called the 'Mortmain Act' but is called by Tyssen the 'Georgian Mortmain Act,' is of a very different nature. One of its purposes, as declared in the preamble, is to avoid 'improvident alienations or dispositions made by languishing or dying persons or by other persons to uses called 'charitable uses; to take place after their deaths, to the disherison of their lawful heirs.' Considered in reference to its purposes, it is not properly called a Mortmain Act. It applies only to gifts for charitable uses; and under it all such gifts, unless made as the statute allows, are absolutely void.

§ 53. "We never have had any real Mortmain Acts in Massachusetts. The nearest approach to one was the provincial statute of 28 George II, Acts 1754, chapter 12, January 12, 1755; 3 Prov. Acts, page 778. This made deacons a corporation to take gifts for charitable purposes, limited the grants to such as would produce an income not exceeding three hundred pounds a year, and provided that they should be made by deed three months before death, and that all bequests, devises or later grants should be void. This statute related only to gifts to deacons and was repealed by Stat. 1785, page 532, chapter 51 (February 20, 1786), 1 Massachusetts Laws, page 282, which re-enacted a part of the law but omitted the provision that gifts not authorized by the act should be void. (Bartlett v. King, 12 Mass. 536–545; 7 Am. Dec. 99. See Rev. Laws, c. 37, § 1.) The significance of this reference to English law and to our legislation is, first, that except for this short period, we have never had in Massachusetts any legislation prohibiting charitable gifts to trustees or corporations or providing that any kind of conveyances, devises or bequests to corporations shall be void. On the other hand, the policy of the commonwealth as expressed both by legislation and the decisions of its courts has been exceedingly liberal to testators and public charities. (Sanderson v. White, 18 Pick. 328, 333, 334, 29 Am. Dec. 591; American Academy v. Harvard College, 12 Gray, 582, 595, 596; Saltonstall v. Saunders, 11 Allen, 446; Jackson v. Phillips, 14 Allen, 539–550.) Secondly, the implied limitations upon the power of corporations to hold property, which appear in numerous enactments, have been made not in the interest of grantors or devisors or their heirs, but in the interest of the state on considerations of public policy. The

general form of those limitations which appears in the statute before us, and with slight variations in special charters (a list of which, 274 in number, granted in this state prior to 1850, has been furnished us through the industry of counsel), corresponds with the form of licenses granted by the Crown in England under the old Mortmain Acts, and sometimes embodied in charters granted by Parliament. Under these English acts, grants or devises to a corporation to hold property without a license or in excess of the amount licensed were not void but only voidable by the mesne lord or the King upon entry after inquest according to law. In view of the close relations between Massachusetts and the mother country in early times, this justifies an argument, of considerable strength, that the implied limitations in our statutes were intended to have no greater force than the old Mortmain Acts of England, as distinguished from the Georgian Mortmain Act. We start with the inherent right, already referred to, of every corporation to take and hold property at common law by virtue of the act of its creation. This right is recognized in our statutes by implication without express mention. (Rev. Laws, c. 109, §§ 4–6.) What force is to be given to the words 'may hold real and personal estate to an amount not exceeding $1,500,000'? The respondent contends that their meaning is as if words were added as follows: 'And beyond that amount it shall have no right, as against the commonwealth, and the commonwealth may take proper measures, through action of the attorney general or otherwise, to prevent or terminate such larger holding.' According to the argument, a taking and holding by a corporation above the prescribed amount is under its inherent right. As between it and the state, as the guardian of the public interest, a provision as to amount is made which does not affect its right as to third persons. As to the general legality of the holding except when the state chooses to enforce the law for its own benefit, the condition is similar to that resulting from a statutory provision which is merely directory. It is not very unlike the old law as to conveyances to aliens. Such conveyances, whether by grant or devise, were good against everyone but the state, and could be set aside only after office found. (Fox v. Southack, 12 Mass. 143; Waugh v. Riley, 8 Met. 290; Judd v. Lawrence, 1 Cush. 531; Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124; 1 Am. Rep. 142.)

"That this is the effect of such limitations in statutes of this kind, where the title of the corporation is under a grant as distinguished from a devise, seems to be the universal rule. (Vidal v. Philadelphia, 2 How. 127–191, 11 L. Ed. 205–231;

Runyan v. Coster, 14 Pet. 122, 10 L. Ed. 382; Union Nat. v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Cowell v. Colorado Springs Co., 100 U. S. 55–60, 25 L. Ed. 547–550; Jones v. New York Guaranty & I. Co., 101 U. S. 622, 25 L. Ed. 1030; National Bank v. Whitney, 103 U. S. 99, 26 L. Ed. 443; Fritts v. Palmer, 132 U. S. 282, 33 L. Ed. 317, 10 Sup. Ct. Rep. 93; Leazure v. Hillegas, supra; Chambers v. St. Louis, 29 Mo. 543, 9 L. R. A., N. S.; Banks v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706; Fayette Land Co. v. Louisville & N. R. Co., 93 Va. 274, 24 S. E. 1016; Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 595; Gilbert v. Hole, 2 S. D. 164, 49 N. W. 1; Barrow v. Nashville & C. Turnp. Co., 9 Humph. 304; Hough v. Cook County Land Co., 73 Ill. 23, 24 Am. Rep. 230; Alexander v. Tolleston Club, 110 Ill. 65; Barnes v. Suddard, 117 Ill. 237, 7 N. E. 477; Hamsher v. Hamsher, 132 Ill. 273, 8 L. R. A. 556, 23 N. E. 1123; Baker v. Neff, 73 Ind. 68–70.) . . . . Some judges, in holding that such titles cannot be taken under wills, endeavor to found a distinction upon the executed character of a title by grant, and suggest that a devise or bequest is executory. It seems to us there is no good reason for the distinction. When a will is proved and allowed, it takes effect immediately to pass all property affected by it. The provision in the law against large holdings by corporations has no relation to the probate of the will. The act of the testator in executing the will is confirmed and given effect as a complete and executed disposition of the property, by the allowance of the will. In this respect a recorded will does not materially differ from a delivered deed. The heirs at law are bound by one as well as by the other.

§ 54. "The decisions upon the precise point at issue are conflicting. In Jones v. Habersham, 107 U. S. 174, 27 L. Ed. 401, 2 Sup. Ct. Rep. 336, a case similar to that now before us, it was held by the court in an opinion by Mr. Justice Gray that 'restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons.' In the same case, in the circuit court, the question had been considered previously, and the same result was reached, in an opinion by Mr. Justice Bradley, of the supreme court of the United States, which is found in 3 Woods, 443–475, Fed Cas. No. 7,465. The same rule is established in Maryland. (Hanson v. Little Sisters of the Poor, 79 Md. 434, 32 L. R. A. 293, 32 Atl. 1052; Re Stickney (Congregational Church Bldg. Soc. v. Everitt), 85 Md. 79–104, 60 Am. St. Rep. 308, 35 L. R. A. 693, 36 Atl. 654.) Re Camp v. Dobbins, 29 N. J. Eq. 36–40, was decided

by the chancellor on this ground. The decree was affirmed on another ground in the court of errors and appeals (31 N. J. Eq. 671–690), in an opinion by Beasley, C. J., which contains a dictum disapproving of the view of the chancellor. In Farrington v. Putnam, 90 Me. 405, 38 L. R. A. 339, 37 Atl. 652, the court, in a very elaborate opinion, in a case identical in its leading features with that now before us, held that the gift was good. The same doctrine is stated in Brigham v. Peter Bent Brigham Hospital (C. C.), 126 Fed. 796–801, 67 C. C. A. 393, 134 Fed. 513–527. It is also stated in textbooks. (Purdy's Beach Corp., §§ 5795–5797; 2 Thomp. Corp., §§ 5795–5797.) The leading case which presents the opposite view is Re McGraw, supra (111 N. Y. 66). Although the decision necessarily puts a construction upon a statute of that state, this construction seems to be materially affected by the policy of New York in reference to charities. Said Judge Peckham, who delivered the opinion: 'We have a decided mortmain policy. It is found in our statute relating to wills prohibiting a devise to a corporation, unless specially permitted by its charter or by some statute to take property by devise.' In Chamberlain v. Chamberlain, 43 N. Y. 424, the court refers to the prohibition of devises, and to Laws 1860, chapter 360, page 607, still in force, which makes void all bequests or devises to charity in excess of one-half the testator's property where he leaves relatives. Other statutes have been passed limiting the amount that can be devised to certain corporations by one testator, forbidding a devise or bequest to charities by a person leaving relatives of more than one-fourth of his estate, and making void such gifts where the will was executed within two months before the death of the testator. (4 Heydecker's Gen. Laws (1901), c. 53, pp. 4885, 4891, 4892.) The policy of that state in regard to charities has been very unfavorable. (See Allen v. Stevens, 161 N. Y. 122–139, 140, 55 N. E. 568; People v. Powers, 147 N. Y. 104, 35 L. R. A. 502, 41 N. E. 432; Fosdick v. Hempstead, 125 N. Y. 581, 11 L. R. A. 715, 26 N. E. 801.)

"The doctrine of the New York court is stated as the law in Davidson College v. Chambers, 56 N. C. (3 Jones Eq.) 253, and adopted in Wood v. Hammond, 16 R. I. 98–115, 17 Atl. 324, 18 Atl. 198, and House of Mercy v. Davidson, 90 Tex. 529, 39 S. W. 924. In the case in North Carolina the decision was by two of the three judges of the court, the chief justice giving an able dissenting opinion. The courts in Kentucky and Tennessee have expressed approval of the McGraw case in New York, but in terms that do not leave the grounds of their decisions entirely clear. (Cromie v. Louisville Orphans'

Home Soc., 3 Bush, 365–383; Heiskell v. Chickasaw Lodge No. 8 I. O. O. F., 87 Tenn. 668–685, 4 L. R. A. 699, 11 S. W. 825.) In reference to supposed errors in the opinion in the last case, see Pritchard on Wills, § 153, note, and Farrington v. Putnam, 90 Me. 405–433, 38 L. R. A. 339, 37 Atl. 652."

§ 55. In holding a conveyance to a national bank for a purpose not authorized by the charter not void but voidable, Hughes, J., in Kerfoot v. Farmers & Merchants' Bank, 218 U. S. 281, said (p. 286):

"In the absence of a clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter is not void, but voidable, and the sovereign alone can object. Neither the grantor nor his heirs nor third persons can impugn it upon the ground that the grantee has exceeded its powers. Smith v. Sheeley, 12 Wall. 358; National Bank v. Matthews, 98 U. S. 621; National Bank v. Whitney, 103 U. S. 99; Reynolds v. Crawfordsville Bank, 112 U. S. 405; Fritts v. Palmer, 132 U. S. 282."

§ 56. Where the taking and holding of land by the corporation is not expressly prohibited or void by reason of being clearly for purposes other than those granted by the charter, the rule is now generally established that only the state can question the right of the corporation to take in cases where the land has passed through the corporation or title has vested in the corporation, subject only to such question. (Saunders v. Farmer, 62 N. H. 572; Chicago B. & Q. R. Co. v. Lewis, 53 Iowa, 101; California State Tel. Co. v. Alta Teleg. Co., 22 Cal. 398; Hamsher v. Hamsher, 132 Ill. 273; Hough v. Cook County Land Co., 73 Ill. 23; In re Stickney, 85 Md. 79; Brigham v. Peter Bent Brigham Hospital, 126 Fed. 796; Eliot's Appeal, 74 Conn. 586; Kelly v. People's Transportation Co., 3 Or. 189; Natoma Water etc. Co. v. Clarkin, 14 Cal. 544; Hayward v. Davidson, 41 Ind. 212; Jones v. Habersham, 107 U. S. 174; Fritts v. Palmer, 132 U. S. 282; Kerfoot v. Farmers & Merchants' Bank, 218 U. S. 281; Thompson, 2d ed., § 2391.)

But where, by reason of the transaction being executory, the corporation must ask the aid of the court to perfect its

right, the individual interested may question the power of the corporation. (Case v. Kelly, 133 U. S. 21; Coleman v. S. R. T. R. Co., 49 Cal. 517; Pacific R. Co. v. Seely, 45 Mo. 212; South & N. A. R. Co. v. Highland Ave. & B. R. Co., 119 Ala. 105; United States v. Northern Pac. R. Co., 152 U. S. 284.)

CHAPTER IV.

ULTRA VIRES TRANSACTIONS.

§ 60. A contract or transaction of a corporation not authorized expressly or impliedly by its charter, being for that reason usually termed ultra vires, has no legal validity, and will not on any ground be recognized or enforced by the courts, for the reason that such contracts are void per se and that it is contrary to public policy to validate and breathe life judicially into usurpation of rights and powers by corporations. On the other hand, it is manifestly unjust for a corporation to receive the benefit of a contract and then shake off the burden by denying its own authority to enter into the contract. This dilemma has resulted in some confusion in the adjudicated cases dealing with ultra vires contracts and transactions with attempted distinctions not always adhered to between executed, partly executed and executory contracts, the mass, as a whole, being leavened but not clarified by the frequent use of the word "estoppel," of much or little meaning. It is now pretty well settled, however, that an ultra vires contract or transaction has no legal validity, and is regarded and treated as such by the courts, but that where it has been so far executed on both sides that it is vain to attempt to restore the parties to the status in which they would be but for the contract or transaction, the courts leave them where they find them, and where the contract or transaction has been partly executed, the courts will, in cases where justice requires it, and in a quantum meruit or other appropriate proceeding instituted for the purpose, enforce restoration, so far as may be possible, of the status of the parties, if there had been no such contract or transaction, not by way of recognizing the contract, but on the basis of its being a nullity.

§ 61. "A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond

the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it.

"When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisite to its existence or to its action, because such requisites might, in fact, have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws.

"The doctrine of the common law, by which a tenant of real estate is estopped to deny his landlord's title, has never been considered by this court as applicable to leases by railroad corporations of their roads and franchises. It certainly has no bearing upon the question whether this defendant may set up that the lease sued on, which is not of real estate, but of personal property, and which includes, as inseparable from the other property transferred, the inalienable franchise of the plaintiff, is unlawful and void, for want of legal capacity in the plaintiff to make it.

§ 62. "A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back or compensation to be made for it.

"In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.

"The ground and the limits of the rule concerning the remedy, in the case of a contract ultra vires which has been

partly performed and under which property has passed, can hardly be summed up better than they were by Mr. Justice Miller in a passage already quoted, where he said that the rule 'stands upon the broad ground that the contract itself is void and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it'; and that 'where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract or whether it will refuse to interfere as the matter stands.' Pennsylvania R. R. v. St. Louis etc. R. R., 118 U. S. 317." (Gray, J., in holding an action for suit under an ultra vires lease not maintainable, in Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, p. 59.)

§ 63. In allowing recovery by way of quantum meruit of property parted with under an ultra vires lease, Peckham, J., in Pullman's Car Co. v. Transportation Co., 171 U. S. 138, p. 149, said:

"This brings us to a discussion of the principles upon which a recovery in this case should be founded. The so-called lease mentioned in this case has been already pronounced illegal and void by this court. (139 U. S. 24.) The contract or lease was held to be unlawful and void because it was beyond the powers conferred upon the Central Company by the legislature, and because it involved an abandonment by that company of its duty to the public. . . . . It was argued on the part of the Central Company that even if the contract sued on were void, yet that having been fully performed on the part of the lessor, and the benefits of it received by the lessee for the period covered by the declaration in that case, the defendant should be estopped from setting up the invalidity of the contract as a defense to the action to recover compensation for that period. But it was answered that this argument, though sustained by the decisions in some of the states, finds no support in the judgment of this court, and cases in this court were cited in which such recoveries were denied.

"It is true that courts in different states have allowed a recovery in such cases, among the latest of which is the case of Bath Gas Light Co. v. Claffy, 151 N. Y. 24, where Chief Judge Andrews, of the court of appeals, examines the various cases, and that court concurred with him in permitting a recovery of rent upon a void lease, where the lessee had enjoyed the benefits of the possession of the property of the

lessor during the time for which the recovery of rent was sought.

"But in the case of this lease now before the court, a recovery of the rent due thereunder was denied the lessor, although the lessee had enjoyed the possession of the property in accordance with the terms of the lease, ... and the opinion of the court ended with the statement that 'Whether this plaintiff could maintain any action against this defendant in the nature of a quantum meruit or otherwise independently of the contract, need not be considered, because it is not presented by this record and has not been argued. This action, according to the declaration and evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant was not liable for.'

§ 64. "The principle is not new, but, on the contrary, it has been frequently announced, commencing in cases considerably over a hundred years old. It was said by Lord Mansfield, in Holman v. Johnson, 1 Cowp. 341, decided in 1775, that 'the objection that a contract is immoral or illegal as between the plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff—by accident, if I may say so. The principle of public policy is this: ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.'

"The cases upholding this doctrine are numerous and emphatic. . . . . They are substantially unanimous in expressing the view that in no way and through no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract, where in order to maintain such recovery it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not, in such endeavor, permit any recovery which will weaken the rule founded upon the principles of public policy already noticed."

§ 65. "The doctrine of ultra vires by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of anyone contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. Pearce v. Madison & Indianapolis R. R., 21 How. 441; Pittsburg etc. Ry. v. Keokuk & Hamilton Bridge Co., 131 U. S. 371, 384; Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 48.

"When the corporation is created by a charter granted by the legislature, any person dealing with it is bound to take notice of the terms of the charter and of the general laws restricting or defining the powers of the corporation. Pearce v. Madison & Indianapolis R. R., above cited; Zabriskie v. Cleveland etc. R. R., 23 How. 381, 398; Thomas v. Railroad Co., 101 U. S. 71; Pennsylvania R. R. v. St. Louis R. R., 118 U. S. 290, 630. In like manner, when the corporation is formed under general laws, by the recording or filing in a public office of the required articles of association and certificate, any person dealing with the association is bound to take notice of the documents recorded or filed, upon which, as authorized and controlled by the general laws, depend the existence of the corporation, the extent of its corporate powers, and its capacity to act as a corporation. Oregon Ry. v. Oregonian Ry., 130 U. S. 1, 25; Central Transp. Co. v. Pullman's Car Co., above cited." (Gray, J., in holding that a lease made by a national bank before being authorized to do business was void and not capable of being enforced by estoppel or otherwise, in McCormick v. Market Bank, 165 U. S. 538, p. 549.)

§ 66. "Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an ultra vires act. The cases of Thomas v. Railroad Co., 101 U. S. 71, Pennsylvania R. R. v. St. Louis etc. R. R., 118 U. S. 290, Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1, Pittsburg etc. Ry. v. Keokuk & Hamilton Bridge Co., 131 U. S. 371, Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, St. Louis etc. R. R. v. Terre Haute & Indianapolis R. R., 145 U. S. 393, Union Pacific Ry.

v. Chicago etc. Ry., 163 U. S. 564, and McCormick v. Market Nat. Bank, 165 U. S. 538, recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute. . . . . The doctrine thus enunciated is likewise that which obtains in England. Ashbury Railway Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653; Attorney General v. Great Eastern Ry. Co., 5 App. Cas. 473; Baroness Wenlock v. The River Dee Co., 10 App. Cas. 354; Trevor v. Whitworth, 12 App. Cas. 409; Ooregum Gold Min. Co. of India v. Roper, [1892] App. Cas. 125; Mann v. Edinburgh Northern Tramways, [1893] App. Cas. 69." (White, J., in California Bank v. Kennedy, 167 U. S. 362, p. 367.)

§ 67. The rule that contracts ultra vires the charter of a corporation are void and will not be enforced nor recognized as having validity is thus well established in the United States supreme court and in the English courts. The only departure in the United States supreme court is perhaps the attitude of the court in cases of real property conveyed to a corporation in excess of charter powers. There can be no difference in principle whether the subject matter of an ultra vires contract be land or something else, except upon the theory illustrated supra, that in America, as well as in England, a corporation has implied power to hold land except as positively prohibited from so doing. The court, however, has gone very far in holding that a conveyance of land to a corporation cannot be questioned collaterally, not merely where it is ultra vires but even when expressly prohibited. Such a rule cannot be supported consistently with the general rule respecting ultra vires contracts heretofore set out, except on the ground, possibly, in particular cases that, the contract being executed, the court is unable in the particular instance to restore the parties to the status quo.

§ 68. In Fritts v Palmer, 132 U. S. 282, in an action in ejectment, in holding that a conveyance to a foreign corporation contrary to express statutory prohibition could not be questioned by the plaintiff, Harlan, J., in delivering the opinion of the court, said:

"In National Bank v. Matthews, 98 U. S. 621, 627, the question was directly presented whether a national bank was en-

titled to the benefit of a deed of trust upon real estate which with the note described in it was taken—not as security for, or in satisfaction of, debts previously contracted in the course of its dealings, but—for a loan made by the bank at the time the deed of trust was assigned to it. The supreme court of Missouri held the deed of trust to be void in the hands of the bank, because its loan was made upon real estate security in violation of the statute. But this court, after observing that the result insisted upon did not necessarily follow. said:

"'The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined.' Again: 'Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose.'

"In National Bank v. Whitney, 103 U. S. 99, 103, which involved the validity of a mortgage to a national bank to secure future advances made to the mortgagor, the right of the bank to enforce the mortgage was sustained upon the principles announced in National Bank v. Matthews. The court said: 'Whatever objection there may be to it as security for such advances from the prohibitory provisions of the statute, the objection can only be urged by the government.' To the same effect are Swope v. Leffingwell, 105 U. S. 3, and Reynolds v. Crawfordsville Bank, 112 U. S. 405, 412.

"In Smith v. Shelley, 12 Wall. 358, 361, which was an action of ejectment, the question was collaterally raised as to the validity of the title acquired by a banking institution, under a deed of the premises, in consideration of a certain sum paid by it to the grantor. The bank was created by an act of the territorial legislature of Nebraska, with power 'to issue bills, deal in exchange and buy and possess property of every kind.' But when that act passed there was in force an act of Congress which provided that 'no act of the territorial legislature of any of the territories of the United States, incorporating any bank or any institution with banking powers or privileges hereafter to be passed, shall have any force or effect whatever, until approved and confirmed by Congress.' The act of the territorial legislature incorporating the bank above referred to never was approved or confirmed by Congress. It was urged, as an objection to the deed made to the bank—upon

which deed one of the parties relied—that it was not a competent grantee to receive title. This court said: 'It is not denied that the bank was duly organized in pursuance of the provisions of an act of the legislature of the territory of Nebraska; but it is said it had no right to transact business until the charter creating it was approved by Congress. This is so, and it could not legally exercise its powers until this approval was obtained; but this defect in its constitution cannot be taken advantage of collaterally. No proposition is more thoroughly settled than this, and it is unnecessary to refer to authorities to support it. Conceding the bank to be guilty of usurpation, it was still a body corporate de facto, exercising at least one of the franchises which the legislature attempted to confer upon it; and, in such a case, the party who makes a sale of real estate to it is not in a position to question its capacity to take the title, after it has paid the consideration for the purpose. If, prior to the execution of the deed, there had been a judgment of ouster against the corporation at the instance of the government, the aspect of the case would be different.' See, also, Myers v. Croft, 13 Wall. 291, 295; Jones v. Guaranty and Indemnity Co., 101 U. S. 622, 628; Fortier v. New Orleans Bank, 112 U. S. 439, 451.

"To the above cases may be added those holding that an alien may take by deed or devise and hold against anyone but the sovereign until office found: Cross v. De Valle, 1 Wall. 1, 13; Governeur v. Robertson, 11 Wheat. 332; National Bank v. Matthews, 98 U. S. 621, 628; Phillips v. Moore, 100 U. S. 208. Also those holding that the question whether a corporation, having capacity to purchase and hold real estate for certain defined purposes, or in certain quantities, has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter concerns only the state within whose limits the property is situated. It cannot be raised collaterally by private persons unless there be something in the statute expressly or by necessary implication authorizing them to do so: Cowell v. Springs Co., 100 U. S. 55, 60; Jones v. Habersham, 107 U. S. 174, 188."

§ 69. Miller, J., dissenting from this opinion of Harlan, J., said (p. 294):

"I can conceive of cases where corporations have been authorized to acquire a limited amount of real estate such as the legislature may conceive to be useful and necessary to the purpose for which they are organized, or to take property for specific uses, in which the question as to whether they have ex-

ceeded that amount or perverted the use may be one for the state alone and not of any private citizen. But the positive declaration that a corporation shall not purchase or hold real estate, which is not a grant of power, but an express denial of its power to hold any real estate under the circumstances mentioned, is, in my opinion, destructive of the right to hold any real estate at all under those circumstances. Whenever it is shown that any of these corporations have not complied with the requirements of the statute, they are forbidden to purchase or hold real estate. Any such purchase is therefore void. It is the positive declaration of the law of the land. The title does not pass, and it needs no inquest on the part of the state to establish that fact. The title which would have passed if the corporation had a right to purchase does not pass. It remains in the party who attempted to grant or convey it. The grantee can neither purchase nor hold real estate. The assumption of the opinion of the court is that it may purchase and it may hold real estate."

§ 70. In holding that the court would not enforce an unexecuted contract for the conveyance of lands to a corporation unauthorized by its charter to hold the lands, Miller, J., in Case v. Kelly, 133 U. S. 21, p. 28, said:

"It is next objected to the principle adopted by the court that the limitation upon the power of the corporation to receive land is one which concerns the state alone, and the title to such lands in a corporation can only be defeated by a proceeding in the nature of a quo warranto on behalf of the state. The case of National Bank v. Matthews, 98 U. S. 621, is strenuously relied on to support this view. We need not stop here to inquire whether this company can hold title to lands which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company or attempted to be so vested. The railroad company is plaintiff in this action and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands, and the question here is not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already and in the possession and ownership of the company void, on the principle that they had no authority to take such lands, it is very clear that

it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids."

In holding a bequest to a corporation of property in excess of the amount authorized by the charter valid, Gray, J., in Jones v. Habersham, 107 U. S. 174, p. 188, said:

"Restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the state which created it. Runyan v. Coster, 14 Pet. 122, 131; Smith v. Shelley, 12 Wall. 358, 361; Bogardus v. Trinity Church, 4 Sand. Ch. (N. Y.) 633, 758; De Camp v. Dobbins, 29 N. J. Eq. 36; Davis v. Old Colony R. R. Co., 131 Mass. 258, 273."

§ 71. In view of Case v. Kelly, supra, however, it is probable that this rule expressed in Jones v. Habersham will be confined, in instances of statutory prohibition, to cases where contracts and transactions have so far been executed that it is practically impossible for the court to do justice to the parties by its interposition.

It is to be noted, moreover, that in cases where a corporation is authorized by its charter to hold land for certain purposes, the question whether any particular piece of land is within the authorized purposes may not be inquired into collaterally, for the reason, among others, that the public, in dealing with the corporation, should not be required, for obvious reasons of public policy, to take the risk of a right or erroneous decision upon the question for the determination of which they cannot ordinarily have requisite facts and data.

In Cowell v. Springs Co., 100 U. S. 55, p. 60, Field, J., said:

"A corporate body competent to exercise some of the powers mentioned was created, and under the statute of the territory could acquire and hold or convey, by deed or otherwise, any real or personal estate whatever, necessary to enable it to carry on its business. Whether the particular premises in controversy are necessary for that business is not important; that is a matter between the government of the state, succeeding that of the territory and the corporation and is no concern of the defendant. It would create great inconvenience, and embarrassments if in actions by corporations to recover the posses-

sion of their real property an investigation was permitted into the necessity of such property for the purposes of their incorporation and the title made to rest upon the proof of that necessity. Natoma Water & Mining Co. v. Clarkin, 14 Cal. 552."

ESTOPPEL TO SET UP ULTRA VIRES AS A DEFENSE.

§ 75. Generally speaking, a person who has held out particular facts as true and has thereby induced others to act in reliance thereon to their detriment, is held estopped from setting up the contrary to be the actual fact.

This rule has been invoked in some jurisdictions to permit recovery on a contract of a corporation ultra vires its charter powers where the contract has been partly performed to the benefit of one of the parties, on the ground that it is unjust to allow the party to receive the benefit and then set up his own wrongdoing as an excuse to avoid responsibility to perform his part. It is frequently said that the plea of ultra vires should not be allowed to prevail where it would not advance justice, but, on the contrary, would accomplish a legal wrong.

This sounds plausible, but will hardly bear cursory inspection, for it assumes the conclusion as to legal wrong and ignores the very fact that an ultra vires contract is unlawful, and therefore at best it amounts to saying that the court will enforce a legal wrong to avoid a legal wrong. If contracts ultra vires corporate charters be contrary to public policy, as generally conceded, then their enforcement because partially executed ignores the public wrong for the sake of doing apparent justice between the parties in the particular case at bar. Estoppel cannot be invoked to support illegal transactions. Contracts to perform tortious or other illegal acts are unenforceable, and no partial performance will estop the defense. It would seem that ultra vires contracts are not less unlawful merely because not expressly prohibited. The immediate injustice between the parties at bar, as abundantly appears elsewhere, can be adequately remedied otherwise than

by subverting public policy, thus giving legal sanction to wrong on the plea of preventing wrong.

§ 76. Several state jurisdictions, however, enforce ultra vires contracts on the basis of estoppel, as is illustrated by the following cases.

In Bissell v. Michigan S. & N. I. R. Co., 22 N. Y. 262, it was held that where two railroad companies, in excess of their powers, combined to operate a third road, they were liable for injuries sustained by a passenger on such road, resulting from their negligence. Comstock, C. J., held the companies estopped to set up the defense of ultra vires and liable on their contracts. Selden, J., held the contract, being ultra vires, was void, but the defendant companies were liable for their negligent torts nevertheless.

Comstock, C. J., in the course of his opinion, said:

"Let us now concede that the unauthorized contracts of a corporation are illegal in the sense contended for; it by no means follows that they are never to be enforced. An agreement declared by statute to be void cannot be enforced because such is the legislative will; but when, without any such declaration, it is simply illegal, it is capable of enforcement where justice plainly requires it. Circumstances may, and often do, exist which estop the offender from taking advantage of his own wrong. The contract may be entered into on the one side without any participation in the guilt and without any knowledge even of the vice which contaminates it. An innocent person may part with value, or otherwise change his situation upon the faith of the contract. A railroad corporation, for example, may purchase iron rails and give its obligation to pay for them, with a design to sell them again on speculation instead of using them for continuing its track. Such a transaction is clearly unauthorized, and is therefore said to be illegal. But if the corporation is deemed to make the contract—in other words, if, as I have above shown, it is a legal possibility for corporations to make contracts outside of their just powers, how can its illegality be set up against the other party who knows nothing of the unlawful purpose? So an incorporated bank may purchase land, having power to do so for a banking-house, but actually intending to speculate in the transaction. This is also ultra vires, but can the want of authority be interposed, in repudiation of a just obligation to pay for the same land, the vendor not being

in pari delicto? Such a doctrine is not only shocking to the reason and conscience of mankind, but it goes beyond the law in regard to the illegal contracts of individuals."

§ 77. In Whitney Arms Co. v. Barlow, 63 N. Y. 62, it was held that where a corporation has fully performed a contract on its part to manufacture and deliver certain articles, it is no defense to an action brought to recover the purchase price that the contract was not within the chartered powers of the corporation. Allen, J., said:

"The plea of ultra vires should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong."

In Woodruff v. Erie Ry. Co., 93 N. Y. 609, it was held that where a railroad company leased its property and privileges to an individual, the lessee was estopped to set up the defense that the lease was ultra vires. (Nassau Bank v. Jones, 95 N. Y. 123.)

In Bath Gaslight Co. v. Claffy, 151 N. Y. 24, it was held that though the lease of all the property and franchises of a gaslight company was ultra vires, that constituted no defense to an action for rent. Andrews, C. J., said:

"But in not infrequent instances corporations enter into unauthorized contracts which are neither mala in se nor mala prohibita, or when the only prohibition or restriction is implied from the grant of specified powers. It is this class of cases which opens the field of controversy. Is such a contract performed by one party, but not performed by the other, void as between them to all intents and purposes, so that no recovery can be had under it against the party who has received the consideration for his promise, but neglects or refuses to perform it, or is it so tainted with illegality that the courts must refuse to recognize it under any circumstances or enforce its obligation, whether as to past or future transactions? . . . .

"The courts in this state, from an early day commencing as far back as the Utica Insurance cases, have sought to regulate and restrict the defense of ultra vires so as to make it consistent with the obligations of justice. Insurance Co. v. Scott, 19 Johns. 1; Curtis v. Leavitt, 15 N. Y. 9; Bissell v. Railroad Cos., 22 N. Y. 260, opinion of Comstock, C. J.; Parish v. Wheeler, Id. 495; Arms Co. v. Barlow, 63 N. Y. 62;

Pratt v. Short, 79 N. Y. 437; Woodruff v. Railway Co., 93 N. Y. 609; Starin v. Edson, 112 N. Y. 206, 19 N. E. 670. . . . . The lease now in question was not in any true sense of the word illegal. It was undoubtedly void as against the state. The parties to the lease assumed it to be valid. It was contemplated, as the provisions of the lease show, that the lessee would continue and extend the business before carried on by the plaintiff, and it is not suggested that it did not during its occupation discharge all the obligations to the public which rested on the plaintiff. The state has not intervened, and the possession of the property has now been restored to its original proprietors. The contract has been terminated as to the future, and all that remains undone is the payment by the lessee of the unpaid rent. We think the demands of public policy are fully satisfied by holding that as to the public the lease was void, but that, as between the parties, so long as the occupation under the lease continued, the lessee was bound to pay the rent, and that its recovery may be enforced by action on the covenant."

§ 78. But in New York an ultra vires contract, if still executory, will not be enforced. (Nassau Bank v. Jones, 95 N. Y. 115.) In this case, in holding that a bank could not enforce a contract to share in a purchase of stock in a railroad company, Ruger, C. J., said:

"While executed contracts made by corporations in excess of their legal powers have, in some cases, been upheld by the courts, and parties have been precluded from setting up as a defense to actions brought by corporations their want of power to enter into such contracts (Bissel v. M. S. & N. I. R. R. Co., 22 N. Y. 258; Whitney Arms Co. v. Barlow, 63 Id. 62; Woodruff v. E. R. R. Co., 93 Id. 618), this doctrine has never been applied to a mere executory contract which is sought to be made the foundation of an action either by or against such corporations."

In Jamison et al. v Citizens' Bank, 122 N. Y. 135, in an action to recover from the bank for losses sustained by it in dealing through plaintiff's brokers in cotton futures, it was held that the bank never having received any benefit was entitled to avail itself of ultra vires as a defense. In speaking of the rule of estoppel to plead ultra vires to an executed contract as being inapplicable to the case at bar, Haight, J., said:

"It is contended that the defense of ultra vires is not available in this case, for the reason that the contract had been executed on the part of the plaintiffs, and that the defendant is estopped from setting up the defense. In the case of Arms Co. v. Barlow, 63 N. Y. 62, the plaintiff was a corporation organized for the purpose of manufacturing every variety of firearms and other implements of war, and all kinds of machinery adapted to the construction thereof. It entered into a contract with the American Seal Lock Company to manufacture and deliver ten thousand locks. The locks having been delivered, it was held that the contract was fully executed, and that the plea of ultra vires would not prevail as a defense to an action brought to recover the contract price. We do not question the rule thus invoked. It has been repeatedly declared in other cases, as, for instance, in Parish v. Wheeler, 22 N. Y. 494, in which it was held that a railroad company, having purchased and received a steamboat, could be compelled to pay for it, although the power to purchase was not included in its charter; but this doctrine has no application to executory contracts which are sought to be made the foundation of an action, or to contracts that are prohibited as against public policy or immoral."

§ 79. In Kadish v. Garden City etc. Assn., 151 Ill. 531, it was held that a loan made by a building and loan association to one for the benefit of a corporation was ultra vires; but the transaction, being executed, was binding. Wilkin, J., said:

"There is, as above shown, no prohibition in the statute against corporations becoming members of homestead loan associations for the purpose of borrowing money. Neither is there any prohibition therein against loaning money for other than business purposes. In other words, the transactions were at most ultra vires, in the commonly understood sense of those words, and nothing more. . . . . All the decisions on this question naturally rest upon the rule 'that where a party has accepted and made his own the benefit of a contract, he has estopped himself from denying in the courts the validity of the instrument by which these benefits came to him.' . . . . While a contract ultra vires remains executory courts will interfere to prevent its enforcement, or on the application of a shareholder or other authorized person prevent its execution; but when it has been carried into effect and the corporation has received the benefit of it, it cannot plead the excess of its power in discharge of its liability."

In Wright v. Hughes, 119 Ind. 324, it was held that the fact that a loan made by a corporation was ultra vires was no defense to the enforcement of the mortgage given to secure it. Mitchell, J., said:

"The rule is now too thoroughly established to be longer open to question that where a contract has been executed and fully performed on the part of the corporation, or of the party with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation."

§ 80. In State v. Corning State Savings Bank, 136 Iowa, 79, it was held that there could be no recovery on a certificate of deposit prohibited by statute, the court (Diemer, J.), saying:

"If the contract were simply ultra vires, the bank having received the benefit thereof would be estopped to deny its liability. Church v. Johnson, 93 Iowa, 54, 61 N. W. 916; Aldrich v. Bank, 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498. But if the contract be one prohibited by law, and therefore unlawful, then no recovery may be had thereon. In re Insurance Co., 107 Iowa, 148, 70 Am. St. Rep. 149, 77 N. W. 868; Steever v. Railroad Co., 62 Iowa, 371, 17 N. W. 595; Stover v. Flower, supra; Page on Contracts, §§ 1083, 1084; State Bank v. Coquillard, 6 Ind. 232; Siter v. Sheets, 7 Ind. 133; Bank v. Parsons, 21 Vt. 199; Dillon v. Allen, 46 Iowa, 299, 26 Am. Rep. 145."

In Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, in holding that a corporation could not shield itself from liability to remedy a wrong by setting up ultra vires as a defense, the court said:

"If such a body transcend its powers, it commits a wrong against the state, and ordinarily it is for the state only to call it to account for such violation. Farwell Co. v. Wolf, 96 Wis. 10, 70 N. W. 289, 71 N. W. 109; Winterfield v. Brewing Co., 96 Wis. 239, 71 N. W. 101; McElroy v. Minnesota Percheron Horse Co., 96 Wis. 317, 71 N. W. 652; Hubbard v. Haley, 96 Wis. 578, 71 N. W. 1036."

In Denver Fire Ins. Co. v. McClelland, 9 Colo. 11, a policy of insurance ultra vires the company was held binding on the company in favor of the policy-holder, the court citing and following the New York cases.

In McQuaig v. Gulf Naval Stores Co. (Fla.), 47 South. 2, a contract for commissions for finding a purchaser for real estate, though ultra vires, was held enforceable against the company, Whitfield, J., saying:

"While those dealing with a private corporation are charged with some degree of care to ascertain the powers of the corporation with reference to the transaction, if the transaction has some fair relation to the matters within the corporate authority, the defense of ultra vires will not, in general, be available to afford injustice or imposition."

§ 81. In Carson City Sav. Bank v. Carson City Elevator Co., 90 Mich. 550, where the articles of the corporation included "buying and selling of grain and other commodities," it was held that the corporation was liable on notes given for grain, whether the statute under which the corporation was formed permitted such a purpose or not, Morse, C. J., saying:

"The plea of ultra vires should not, as a general rule, prevail, whether interposed for or against a corporation, where it would not advance justice but, on the contrary, would accomplish a legal wrong."

In Central Bldg. & Loan Assn. v. Lampson, 60 Minn. 422, the plea of ultra vires was held no defense to the recovery of a loan made by the corporation to the defendant on the ground that the plea would not be allowed in the case of an executed contract where it works injustice.

Similarly, Union Hardware Co. v. Mfg. Co., 58 Conn. 219; Third Avenue Sav. Bank v. Dimock, 24 N. J. Eq. 26; Camden & A. R. Co. v. May's Landing etc. R. Co., 48 N. J. L. 530; Wright v. Pipe Line Co., 101 Pa. 204; Burke etc. Co. v. Wells-Fargo & Co., 7 Idaho, 42.

§ 82. The weight of authority of the state courts, however, supports the strict rule recognizing ultra vires as a defense not estopped by performance, as appears from the following:

In Davis v. Old Colony R. R., 131 Mass. 258, it was held that no action could be maintained on an ultra vires guaranty, though acted upon at great outlay. Gray, C. J., fully discussing the English and United States supreme court cases, said:

"A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the government nor by the stockholders as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person or of an ordinary partnership, but with such only as its charter confers. If it exceeds its charter powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder, will restrain the corporation from carrying out its contract; and a court of common law will sustain no action on the contract against the corporation.

"Every person who enters into a contract with a corporation is bound, at his peril, to take notice of the legal limits of its capacity, especially where, as in this commonwealth, all acts of incorporation are deemed public acts, and every corporation organized under general laws is required to file in the office of the secretary of the commonwealth a certificate showing the purpose for which the corporation is constituted. Gen. Stats., c. 3, § 5; Stats. 1870, c. 224, §§ 7, 11; Whitenton Mills v. Upton, 10 Gray, 582, 598; Richardson v. Sibley, 11 Allen, 65, 72; Pearce v. Madison & Indianapolis R. R., 21 How. 441, 443; East Anglian Rys. v. Eastern Counties Ry., 11 C. B. 775, 811; Ashbury Ry. Carriage & Tran. Co. v. Riche, L. R. 7 H. L. 653.

"There is a clear distinction, as was pointed out by Mr. Justice Campbell in Zabriskie v. Cleveland, C. & C. R. R., 23 How. 381, 398, by Mr. Justice Hoar in Monument Bank v. Globe Works, 101 Mass. 57, 58, and by Lord Chancellor Cairns and Lord Hatherly in Ashbury Ry. Carriage & Tran. Co. v. Riche, L. R. 7 H. L. 668, 684, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice, and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, where such abuse or failure is not known to the other contracting party."

§ 83. In Buckeye Marble & Freestone Co. v. Harvey, 92 Tenn. 115, it was held that the sale of stock to a foreign corporation was ultra vires, and that the defendant president of

the domestic corporation, though he had received the benefit of the contract for such sale, was nevertheless, when sued on the contract, entitled to set up the defense of ultra vires. Lurton, J., said:

"The passage cited by counsel from Railway Co. v. McCarthy, 96 U. S. 267, 'that the doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice or work a legal wrong,' is misleading, and if literally construed, would result in an erroneous practical extension of the powers of corporations. We do not understand that a result required by adherence to the law would be either unjust or a legal wrong. The learned judge doubtless intended to be understood that the defense would be a legal wrong only when the law did not require its consideration by the court."

In Metropolitan Stock Exch. v. Lyndonville Nat. Bank, 76 Vt. 303, it was held, citing the United States supreme court cases, that a corporation could not be estopped from making the defense of ultra vires.

In Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165, it was held that the corporation had no power to mortgage its property to secure the individual debt of one of its stockholders, and such mortgage was void as to creditors, though assented to by all the stockholders.

§ 84. In Franklin Co. v. Lewiston Savings Bank, 62 Me. 43, it was held that the savings bank had no power to subscribe for stock in another corporation, and that notes given by the bank upon such a subscription were void as ultra vires, and that though acted upon, the bank was not estopped from setting up ultra vires as a defense, and that the bank having received no benefit, no recovery on a quantum meruit against the bank could be had. Walton, J., said:

"And with respect to such acts and contracts, it has been very aptly said that the powers and franchises of corporations are grants from the government; that it would be just as reasonable and just as legal to allow one who has a patent for one hundred acres of land to take possession of two hundred acres as to allow a corporation to usurp and exercise a power not conveyed to it in its charter."

In Hood v. New York & New Haven R. R., 22 Conn. 501, it was held that the plaintiff, though he had paid the consideration, could not enforce a contract ultra vires and beyond the corporate powers of the defendant to make, and that the defendants were not estopped from setting up the defense. Ellsworth, J., said:

"We place our judgment upon a plain principle of equity and law, viz., that these defendants are not bound by a contract they had no power to make, and are not estopped setting up this matter in defense."

§ 85. In Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, it was held that in a contract between a corporation and parties other than stockholders, when the act in question is one which the corporation has no power to perform under any circumstances, the corporation may in any case avail itself of the defense of ultra vires; but when the act in question may be performed by the corporation for some purposes but not for others, then, though the act be ultra vires in fact, the corporation may be estopped by the circumstances of the particular case from setting up the defense, and further corporate acts are presumed to be within the corporate powers until the contrary is established.

In Portland Lumbering & Mfg. Co. v. City of Portland, 18 Or. 21, in an action to recover for materials furnished the city used in making a street improvement, it was held that ultra vires was not a defense where the power existed but there was a departure from the strict requirement of the law in its exercise.

In Re Assignment of P. H. Co., 24 Or. 330, it was held that the claim of a creditor of the insolvent company for lime sold the company was valid, though dealing in lime was ultra vires the company, the latter having had the lime and therefore being in justice bound to pay for it. It does not appear whether the claim was allowed on the basis of the contract price or on a quantum meruit. So far as the opinion of the court goes, the decision is consistent with the Massachusetts and United States supreme court rule.

In Chewacla Lime Works v. Dismukes, 87 Ala. 344, it was held that "The established rule in this state is that a corporation is not estopped, by reason of having received the benefits of a contract which is ultra vires, from setting up its invalidity in defense of a suit brought to enforce it."

Strict rule of United States supreme court followed in White v. Bank, 22 Pick. 181; Morville v. Society, 25 Am. Rep. 40; Davis v. Railroad Co., 41 Am. Rep. 221; Paul v. Kenasha, 94 Am. Dec. 598; Moore v. Tanning Co., 60 Vt. 459; Anthony v. Sewing Mach. Co., 16 R. I. 571; Harriman v. First etc. Church, 66 Ga. 186; Day v. Buggy Co., 57 Mich. 146.

§ 86. Where, however, the power is existent by the terms of the charter but has been exceeded or otherwise abused without practicable means of ascertainment by one dealing with the corporation, it is generally agreed that the party at fault may be estopped from setting up the abuse or ultra vires act. (National Bank v. Case, 99 U. S. 628; Ossipee Hosiery & Woolen Mfg. Co. v. Canney, 54 N. H. 295; Prescott Nat. Bank v. Butler, 157 Mass. 548; National Bank v. Whitney, 103 U. S. 99; Humphrey v. Patrons Mercantile Assn., 50 Iowa, 607; Little v. O'Brien, 9 Mass. 423.)

The law presumes the corporation to be acting within its corporate powers until the contrary is proved. (Louisville etc. Ry. Co. v. Louisville Trust Co., 174 U. S. 552; International Bldg. etc. Assn. v. Wall, 153 Ind. 554; Thomp. Corp., § 2779.)

CHAPTER V.

CORPORATE CRIMES AND TORTS.

§ 90. Just as a contract of a corporation ultra vires its charter powers is a nullity as creating no valid contractual obligation, so a corporate authority, express or implied, to do a public or private wrong recognized as a crime or a tort is a nullity as conferring no valid authority so to do; nevertheless it is true that such corporate action if it does occur is not rightful but wrongful, and therefore if because of, and pursuant to, such wrongful action an agent or agents of the corporation commits the wrong to the public or individual, the corporation is responsible, and is held liable for the crime or tort as the case may be. In the case of torts, the corporation is answerable in damages; in the case of crimes, the corporation may be fined, its property sequestered or its charter forfeited.

In National Bank v. Graham, 100 U. S. 699, in holding a national bank liable in damages occasioned by its gross negligence in losing a special deposit which it received ultra vires its charter, Swayne, J., said (p. 702):

"Corporations are liable for every wrong they commit, and in such cases the doctrine of ultra vires has no application.

"They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. Merchants' Bank v. State Bank, 10 Wall. 604. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel. In certain cases it may be indicted for misfeasance or nonfeasance touching duties imposed upon it in which the public are interested. Its offenses may be such as will forfeit its existence. Philadelphia, Wilmington & Baltimore R. R. Co. v. Quigley, 21 How. 209; 2 Wait on Actions and Defenses, pp. 337–339; Angell & Ames on Corporations, secs. 186, 385; Cooley on Torts, pp. 119, 120."

MONOPOLIES, TRUSTS AND RESTRAINTS OF TRADE.

§ 91. The derivative meaning and as well the common, ordinary significance of the term "monopoly" is sole possession of wealth. At the common law it came to be applied specifically to designate the exclusive control of the manufacture or sale of some product or commodity, and as incidental to this the term is frequently used in a secondary sense or significance to denote the elimination of competition in production or distribution, manufacture, trade or commerce.

In these different cognate senses it is applied to denote all sorts of combinations and contracts having for their purpose the control of wealth and its production and distribution, particularly restrictions of competition, usually termed restraints of trade.

The term "trust" originated in the particular form of combination attempted by corporations by placing the entire stock of several corporations in a single trustee or trustees, with full power to manage the several corporations thus united; e. g., People v. North River Sugar Refining Co., 121 N. Y. 582. From this the term "trust" came to be applied to all sorts of large corporations or combinations whose apparent tendency is to control the manufacture or sale of a particular product or commodity.

At common law, contracts having for their purpose the restriction of competition, and thus being in restraint of trade, are held void and unenforceable as being contrary to public policy, excepting, however, certain contracts partially restricting competition to the extent reasonably necessary to protect the main object of the contract in question, e. g.. in the case of the sale of a business, the vendor agreeing not to compete within certain localities for a certain period of time, such agreements, though restricting competition and in restraint of trade strictly, being held not to be contrary to public policy where reasonably necessary.

§ 92. In Oregon Steam Navigation Co. v. Winsor (1873), 20 Wall. (U. S.) 64, an agreement made, on the sale of a steamer, that it should not be employed for ten years in Cali-

fornia waters was held not to be in restraint of trade, and valid. Bradley, J., said:

"It is a well-settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. A contract, even on good consideration, not to use a trade anywhere in England, is held void in that country as being too general a restraint of trade; but a contract not to use a trade at a particular place, if it be founded on a good consideration and be made for a proper and useful purpose, is valid. Of course, a contract not to exercise a trade generally would be obnoxious to the rule, and would be void. . . . . There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is against public policy. One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general—not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other, it is free from objection, and may be enforced.

"In accordance with these principles it is well settled that a stipulation by a vendee of any trade, business or establishment that the vendor shall not exercise the same trade or business or erect a similar establishment within a reasonable distance, so as not to interfere with the value of the trade, business or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade in which he is himself engaged that it shall not be used within a reasonable region or distance, so as not to interfere with his said business or trade, is also valid and binding."

§ 93. In Fowle v. Park, 131 U. S. 88, a contract, whereby the sale of a patent medicine by one of the parties was prohibited in certain states and territory, was held valid.

In Gibbs v. Baltimore Gas Co., 130 U. S. 396, an agreement between two gas companies for the regulation of rates, and whereby one should cease laying pipes in violation of the state statute, was held unenforceable.

In Chicago & R. R. Co. v. Pullman Car Co. (1890), 139 U. S. 79, Harlan, J., held an agreement giving the Pullman company the exclusive right to run its cars over the railroad company's lines was not in restraint of trade at common law.

In Carter v. Alling, 43 Fed. 208, an agreement by a traveling salesman not to enter employment of a competitor for a period of three years was held valid.

In Durber Co. v. Howard Co., 66 Fed. 643, an agreement among several not to buy watch-cases of plaintiff was held only a partial restraint of trade and not invalid.

In American Strawboard Co. v. Haldeman Paper Co., 83 Fed. 619, an agreement by a lessee of a paper-mill not to manufacture certain classes of paper for a period of years was held valid.

In Fisheries Co. v. Lennen, 116 Fed. 217 and 130 Fed. 533, an agreement by sellers of property not to deal in certain fish on the Atlantic seaboard for a period of years was held valid.

In Harrison v. Glucose Sugar Ref. Co., 116 Fed. 304, a stipulation in a contract of employment, whereby the employee covenanted not to be interested in the same business for the period of the contract within fifteen hundred miles of Chicago except under the contract, was held valid.

In National Enameling & Stamping Co. v. Haberman, 120 Fed. 415, a general restrictive covenant, unlimited as to time and covering the entire United States, was held valid.

In A. Booth & Co. v. Davis, 127 Fed. 875, a covenant by stockholders of a company which sold its business not to engage in the same business in the same or adjacent territory for ten years was held valid.

In Robinson v. Suburban Brick Co., 127 Fed. 804, a covenant in a contract by which owners of a brick plant conveyed

it to a corporation, agreeing not to engage in competing business within fifty miles for ten years, was held valid.

§ 94. In United States v. Addyston Pipe & Steel Co., 85 Fed. 271, in holding that a restrictive covenant, to be upheld, whether it be in partial or general restraint of trade, must be ancillary to a lawful contract, and where the main contract was in restraint of trade, it is in violation of the Sherman Act of 1890, Taft, J., said:

"For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant servant or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2 and 3) to the enjoyment by the buyer of the property, goodwill or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business, caused by the unjust use on the part of the employee of the confidential knowledge acquired in such business. Under the first class come the cases of Mitchell v. Reynolds, 1 P. Wms. 181; Fowle v. Parke, 131 U. S. 88, 9 Sup. Ct. 658; Nordenfeldt v. Maxim Nordenfeldt Co. (1894), App. Cas. 534; Rousillon v. Rousillon, 14 Ch. Div. 351; Cloth Co. v. Lorsont, L. R. 9 Eq. 345; Whittaker v. Howe, 3 Beav. 383; Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419; Tode v. Gross, 127 N. Y. 480, 28 N. E. 469; Beal v. Chase, 31 Mich. 490; Hubbard v. Miller, 27 Mich. 15; National Ben. Co. v. Union Hospital Co., 45 Minn. 272, 47 N. W. 806; Whitney v. Slayton, 40 Me. 224; Pierce v. Fuller, 8 Mass. 222; Richards v. Seating Co., 87 Wis. 503, 58 N. W. 787. In the second class are Tallis v. Tallis, 1 El. & Bl. 391, and Lange v. Werk, 2 Ohio St. 520. In the third class are Machinery Co. v. Dolph,

138 U. S. 617, 11 Sup. Ct. 412, Id. 28 Fed. 553, and Matthews v. Associated Press, 136 N. Y. 333, 32 N. E. 981. In the fourth class are American Strawboard Co. v. Haldeman Paper Co., 83 Fed. 619, and Hitchcock v. Anthony, Id. 779, both decisions of this court; Navigation Co. v. Winsor, 20 Wall. 64; Dunlop v. Gregory, 10 N. Y. 241; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335. While in the fifth class are the cases of Homer v. Ashford, 3 Bing. 322; Horner v. Graves, 7 Bing. 735; Hitchcock v. Coker, 6 Adol. & E. 454; Ward v. Byrne, 5 Mees. & W. 547; Dubowski v. Goldstein (1896), 1 Q. B. 478; Peels v. Saalfeld (1892), 2 Ch. 149; Taylor v. Blanchard, 13 Allen, 370; Keeler v. Taylor, 53 Pa. St. 467; Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. 712."

§ 95. In Gamewell Fire Alarm Tel. Co. v. Crane (Mass. 1893), 35 N. E. 98, a covenant by a manufacturer of fire-alarm apparatus made on the sale of his plant and stock not to enter into competition with the purchaser for ten years was held void, as being unrestricted as to place.

In Hurren v. Gavin (Ill. 1896), 44 N. E. 735, a covenant made by seller of an undertaking business not to engage in the business in the city for five years was held not to be invalid as being in restraint of trade.

In Anchor Electric Co. v. Hawkes (Mass. 1898), 50 N. E. 509, a covenant made by officers of corporations manufacturing and dealing in electric goods, on the sale of the business to a new corporation, in which they became officers, not to engage in competition for five years was held valid, the Crane case being distinguished on the ground that there the restrictive covenant was not incidental.

In Trentman v. Wahrenburg (Ind. 1903), 65 N. E. 1057, an agreement by a dealer in building materials, on selling out the business, to refrain from engaging therein for a period of five years within a specified county was held valid, the limitation as to time and the restriction as to place being reasonable.

In Palmer v. Toms (Wis. 1897), 71 N. W. 654, a covenant by the seller of a livery business not to engage in that business in the same city for five years was held valid.

In Swigert & Howard v. Tilden (Iowa, 1903), 97 N. W. 82, a covenant by a seller of mail order shirt business not to

engage or lend his assistance in the manufacture of shirts within one hundred miles of Des Moines, Iowa, nor engage in selling shirts made to order for ten years in Iowa and Nebraska, was held valid.

In Moore & Handley Hardware Co. v. Towers Hardware Co. (Ala. 1889), 6 South. 41, where one of two competing firms sold out to the other, an agreement by those selling not to handle goods in competition with the buyers in a specified territory was held valid, but not binding on a corporation afterward formed in which the sellers were stockholders.

In Cowan v. Fairbrother (N. C. 1896), 24 S. E. 212, a covenant by a seller of a newspaper not to edit or print a newspaper within a certain locality was held valid.

In Tardy v. Creasy (1886), 81 Va. 553, a covenant, on sale of land, restricting all sorts of business thereon, was held invalid as in restraint of trade.

In Monongahela Coal Co. v. Jutte, 210 Pa. 288, it was held that a contract, one of several, made by a coal combination with an individual selling his mines, etc., to the coal company, whereby he agreed not to engage, directly or indirectly, in the mining of coal for ten years within territory traversed by certain rivers and covering several states, was in violation of the federal anti-trust act.

§ 96. In Davis v. A. Booth & Co., 131 Fed. 31, it was held that a restrictive covenant ancillary to sale of business was not invalidated by the federal anti-trust act. To same effect, Robinson v. Suburban Brick Co., 127 Fed. 804; Walsh v. Dwight, 40 App. Div. (N. Y.) 513; Britt v. Ebel, 29 App. Div. 256; Bancroft v. Union Embossing Co., 72 N. H. 402; Phillips v. Iola Cement Co., 125 Fed. 593. And in Cincinnati, P. B. S. & P. Packet Co. v. Bay (1906), 200 U. S. 179, it was held that a contract for the sale of vessels engaged in interstate commerce is not invalidated by an agreement of the vendors to withdraw from business for a specified time.

It has also been generally held that similar restrictive covenants ancillary to contracts for sale of business are not in violation of state anti-trust laws (Walsh v. Dwight, 40 App. Div. 513; Espenson v. Koepke, 93 Minn. 278; Downing v.

Lewis, 56 Neb. 386; Queen Ins. Co. v. State, 86 Tex. 250; Gates v. Hooper, 90 Tex. 563); but where the main contract is restrictive of trade, it is void. (Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429; Bingham v. Brands, 119 Mich. 255; Texas & P. Coal Co. v. Lawson, 89 Tex. 394.)

§ 97. Contracts giving exclusive right to handle goods in a particular locality are generally held valid. (Central Shade Roller Co. v. Cushman, 143 Mass. 353; State v. St. Paul Gas Light Co., 92 Minn. 467; Over v. Byram Foundry Co., 37 Ind. App. 452; Heimbuecher v. Goff, Horner & Co., 119 Ill. App. 373; Schwalm v. Holmes, 49 Cal. 665; Standard Fireproofing Co. v. St. Louis Fireproofing Co., 177 Mo. 559; Woods v. Hart, 50 Neb. 497; Clark v. Crosby, 37 Vt. 188; Roller v. Ott, 14 Kan. 609; Keith v. Herschberg Optical Co., 48 Ark. 138; Hauck v. Wright, 77 Miss. 476; Welch v. Phelps etc. Mill Co., 89 Tex. 653.) But where the contract is with one acquiring a monopoly, and for the furtherance of such monopoly, it is void. (Detroit Salt Co. v. National Salt Co., 134 Mich. 103; Texas v. Brewing Co., 90 Tex. 277; Fuqua v. Pabst Brewing Co., 90 Tex. 298; Simmons v. Terry (Tex. Civ. App.), 79 S. W. 1103.)

§ 98. An agreement restricting the class of persons to whom goods shall be sold and from whom they shall be bought is generally invalid. (Montague & Co. v. Lowry, 193 U. S. 38; Loder v. Jayne, 142 Fed. 1010; Ellis v. Inman, 131 Fed. 182; Bailey v. Master Plumbers' Assn., 103 Tenn. 99; Walsh v. Master Plumbers' Assn., 97 Mo. App. 280; Ferd Heim Brewing Co. v. Belinder, 97 Mo. App. 64; Straus v. American Publishers' Assn., 177 N. Y. 473; Bobbs Merrill Co. v. Straus, 139 Fed. 155.) But such agreements have been held not invalid under exceptional circumstances. (Gladish v. Kansas City Livestock Exchange, 113 Mo. App. 726; Park Sons Co. v. National Assn., 175 N. Y. 1; Brewster v. Millers Sons Co., 101 Ky. 368; Whitwell v. Continental Tobacco Co., 125 Fed. 454.)

§ 99. Moreover, whenever it appeared that any combination, by way of contract, agreement, trust, or whatever the

plan of procedure, had for its real object monopoly as generally understood, such combination was held illegal and void at common law.

§ 100. In People v. North River Sugar Refining Co. (1890), 121 N. Y. 582, the defendant company had joined a combination of twenty similar companies, under an agreement whereby the capital stock was vested in a managing board as trustees, with full power to manage the business of the companies severally and collectively. It was held that the company had violated its corporate duties and obligations by becoming party to such a trust, and must be dissolved. Finch, J., in delivering the opinion of the court, said:

"The combination, therefore, framed by the deed was a trust; and if created by the corporations or in any respect the consequence or product of their action, some inevitable results would be certain to follow. . . . . As corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their normal functions and maims and cripples their separate activity, and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest; and that to a much greater extent when, beyond their own several aggregations of capital, they compact them all into one combination, which stands outside of the ward of the state, which dominates the range of an entire industry, and puts upon the market a capital stock, proudly defiant of actual values and capable of unlimited expansion. It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group at his sovereign will; for it is one thing for the state to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. . . . . Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this state there can be no partnerships of separate and independent corporations, whether directly or indirectly, through the medium of a trust; no substantial consolidations which avoid and disregard the

statutory permissions and restraints; but that manufacturing corporations must be and remain several as they were created or become one under the statute."

§ 101. In State v. Standard Oil Co. (1892), 49 Ohio St. 137, in holding that the Standard Oil Company of Ohio should be ousted from carrying out an agreement whereby its stock should, with that of other similar companies, be vested in a board of managing trustees, Minshall, J., said:

"Much has been said in favor of the objects of the Standard Oil Trust and what it has accomplished. It may be true that it has improved the quality and cheapened the costs of petroleum and its products to the consumer. But such is not one of the usual or general results of a monopoly; and it is the policy of the law to regard not what may, but what usually, happens. Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others. The claim of having cheapened the price to the consumer is the usual pretext on which monopolies of the kind are defended, and is well answered in Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102. After commenting on the tendency of the combination known as the 'Diamond Match Company' to prevent fair competition and to control prices, Champlin, J., said: 'It is no answer to say that this monopoly has reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree.' Monopolies have always been regarded as contrary to the spirit and policy of the common law. The objections are stated in the 'Case of Monopolies,' Darcy v. Allein, Coke pt. II, 84b. They are these: (1) 'That the price of the same commodity will be raised, for he who has the sole selling of any commodity may well make the price as he pleases.' (2) 'The incident to a monopoly is that after the monopoly is granted, the commodity is not so good and merchantable as it was before; for the patentee having the sole trade regards only his private benefit and not the commonwealth.' (3) 'It tends to the impoverishment of divers artificers and others, who before, by the labor of their hands in their art or trade, had maintained themselves and their families, who will now of necessity be constrained to live in idleness and beggary.' The third objection, though frequently overlooked, is none the less important. A society in which a few men are the employers and the great body are merely employees or ser-

vants is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the members engaged in independent pursuits or in the profits of production as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime. It is true that in the case just cited the monopoly had been created by letters patent. But the objections lie not to the manner in which the monopoly is created. The effect on industrial liberty and the price of commodities will be the same, whether created by patent or by an extensive combination among those engaged in similar industries controlled by one management. By the invariable laws of human nature, competition will be excluded and prices controlled in the interest of those connected with the combination or trust."

§ 102. In Mogul Steamship Co. v. McGregor (1889), L. R. 23 Q. B. Div. 598, affirmed (1892), H. L. App. Cas. 25, in holding that a combination of ship owners, for the purpose of cutting rates in the shipment of tea and thus keeping the business in their own control, driving the plaintiffs from the field, was not an unlawful conspiracy in restraint of trade, Bowen, L. J., said:

"If, indeed, it could be plainly proved that the mere formation of 'conferences,' 'trusts' or 'associations' such as these were always necessarily injurious to the public—a view which involves, perhaps, the disputable assumption that, in a country of free trade, and one which is not under the iron regime of statutory monopolies, such confederations can ever be really successful—and if the evil of them were not sufficiently dealt with by the common-law rule, which held such agreements to be void as distinct from holding them to be criminal, there might be some reason for thinking that the common law ought to discover within its arsenal of sound common-sense principles some further remedy commensurate with the mischief. Neither of these assumptions are, to my mind, at all evident, nor is it the province of judges to mold and stretch the law of conspiracy in order to keep pace with the calculations of political economy. If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law."

§ 103. In 1890, it being conceded, by consensus of opinion more or less general, that large corporate aggregations, as distinguished from combinations by way of agreement, were not merely, by reason of their largeness, illegal at common law as conspiracies, monopolies or restraints of trade, the so-called Sherman Anti-Trust Act was enacted by Congress, afterward supplemented by the act of 1894, by which contracts, combinations in the form of trust or otherwise, or conspiracies in restraint of interstate trade or commerce, were declared illegal and void.

§ 104. In the application of these statutory provisions to particular cases, two questions have always been presented for answer: (1) Is the contract, combination or corporation a transaction in interstate or foreign commerce? (2) Is it in restraint of trade? This latter requires that a construction be placed on the term "restraint of trade," and there has been voluminous discussion as to whether that means much, nothing, or something. It has been recently construed to mean something, in the particular circumstances of a particular case, to be spotted in the "light of reason."

In United States v. E. C. Knight Co. (1894), 156 U. S. 1, a bill was filed by the United States government to have declared void and enjoined an agreement whereby the American Sugar Refining Company agreed to take over the stock of several Pennsylvania sugar refineries, thereby obtaining practical control of the manufacture of sugar in the United States. The supreme court affirmed the decree of the courts below dismissing the bill. Fuller, C. J., in the opinion of the court, held that while the agreements did tend to bring about monopoly in the manufacture of sugar in the several states, manufacture was not trade or commerce, and the agreements controlling manufacture within the states did not restrain interstate trade or commerce, and were not subject to regulation by Congress; Harlan, J., dissenting on the ground that control of manufacture controlled prices and therefore affected interstate commerce, and therefore was subject to the provisions of the act.

§ 105. In United States v. Freight Assn. (1896), 166 U. S. 290, an agreement among several railroad companies made in 1889 to maintain rates and regulate traffic was declared illegal, as in restraint of interstate commerce, four justices, including White, J., dissenting, on the ground that it was not an unreasonable restraint.

In United States v. Joint Traffic Assn. (1898), 171 U. S. 505, a traffic agreement similar to the Freight Association agreement was held invalid as a restraint of trade, with the same dissenting justices.

In Addyston Pipe & Steel Co. v. United States (1899), 175 U. S. 211, a combination of pipe manufacturers regulating the manufacture and the marketing and sale of pipe from one state to another was held, by reason of the latter, distinguishable from the Knight case, and to be a restraint of interstate trade within the statute, which also was held constitutional as within the power of Congress to regulate interstate commerce.

In Connolly v. Union Sewer-Pipe Co. (1902), 184 U. S. 540, it was held that while a combination might be illegal as such, that did not prevent recovery for product sold.

In Montague & Co. v. Lowry (1903), 193 U. S. 38, a combination of manufacturers of tiles in California and elsewhere, regulating the manufacture and sale of tiles, was held illegal, and the parties injured entitled to treble damages under the statute.

§ 106. In Northern Securities Co. v. United States (1904), 193 U. S. 197, it was held, Harlan, J., delivering the opinion of the court, that a holding company formed to acquire a majority of the stock of two great competing railroads was a combination in restraint of trade within the statute, and was illegal, and the holding company was enjoined from voting or otherwise controlling the stock of the respective railroad companies; White, Fuller, C. J., Peckham and Holmes, JJ., dissenting on the ground that such a construction and extension of the Sherman Act was in excess of the power of Congress and in violation of fundamental property rights.

In Loewe v. Lawlor (1908), 208 U. S. 274, it was held that a combination of labor organizations to compel a manufacturer

to unionize his shops or boycott his business in different states was an illegal combination in restraint of trade in violation of the act.

In Shawnee Co. v. Anderson (1908), 209 U. S. 423, a lease by a company of its goodwill and business was held void, as being, under the circumstances of the case, in restraint of interstate commerce.

In Swift & Co. v. United States (1905), 196 U. S. 375, it was held, in an opinion by Holmes, J., that a combination of meat-packers regulating prices and shipments was in violation of the Sherman Act, as being in restraint of commerce, being distinguished from the Knight case, as that involved only a combination in manufacture.

§ 107. In Standard Oil Co. v. United States (1911), 221 U. S. 1, the Standard Oil Company was held to be a combination in restraint of trade within the statute, and ordered dissolved; White, C. J., in the opinion of the court, stating, as part of the reasoning on which the decision was reached, that the act must be construed in the light of reason, and the meaning of "restraint of trade" must be determined, with reference to the scope of its usage at the time of the passage of the act, not to be any and every restraint in the strictest sense, but restraints found, on fair inspection of the circumstances surrounding a particular case, to be reasonably calculated to produce the evil aimed at in the act; Harlan, J., concurring in the result, but dissenting from the reasoning of the chief justice, insisting on a strict and literal construction of the term "restraint of trade."

Similarly, United States v. American Tobacco Co. (1911), 221 U. S. 106.

CHAPTER VI.

STOCKHOLDERS.

§ 110. A corporation, by reason of its peculiar character as a legal entity purely the creature of statute, has marked characteristics in its mutual relations with certain individuals and groups of individuals composed of its membership, or stockholders, directors and officers.

The mutual rights, duties and liabilities existing between the corporation and these individuals and groups of individuals are for the most part contractual, the terms and limits of the contractual rights, duties and obligations being partly statutory and partly by way of express agreement between the parties and the corporation and the parties. In the first place, the rights, duties and liabilities of stockholders as between themselves, the corporation and third parties will be summarily stated.

§ 111. An individual by becoming a stockholder in a corporation, whether by subscription to its stock on its formation or by purchase of stock later, may with precision be said to assume a contractual status, as distinguished from a right of property or a chose in action, in relation to the corporation in question, defined by the governing corporation law, the charter, the by-laws and the particular terms embodied in the stock subscription and stock certificate. It is not a right of property, for the stockholder does not own any part of the corporate property, even his certificate of stock being simply evidence of his status as a stockholder. It is not a chose in action, for the corporation is under no pecuniary liability to the stockholder as such. It may, however, in various events give rise to a chose in action; as, for instance, in case a dividend is declared and not paid, and in the event of dissolution or other termination of the corporation the stockholder is entitled to have his pro rata share of the assets over liabilities paid and delivered over to him.

§ 112. On subscribing to the stock of a corporation the subscriber becomes liable to pay the amount of his subscription, which is the limit of his liability, unless otherwise provided by statute. He becomes by so subscribing a member and stockholder of the corporation, having the right to participate as such in the management of the corporation, by voting at stockholders' meetings and otherwise in accordance with the charter and by-laws when adopted, to have a stock certificate as evidence of membership, and to share in any dividends declared and in the assets of the corporation on its termination, by dissolution or otherwise. The stockholder has a right to have the corporation managed and conducted for the benefit of the whole body of stockholders in accordance with the charter, but the judgment and action of that majority of the stockholders required by the by-laws for action in the particular case, whether acting directly or through the directors and officers, is conclusive and binding in and out of court, unless fraud or a violation of the charter is clearly shown.

On the transfer of stock the transferee succeeds to the rights and liabilities of the transferrer, except that the transferee must enforce his right to have the transfer recorded in the books of the company before he will be recognized as a stockholder and member of the corporation, at the same time obtaining a stock certificate in his own name as evidence of membership.

§ 113. In holding that a corporation owning stock in another corporation had no interest in the property of the latter which it could mortgage, Field, J., in Humphreys v. McKissock, 140 U. S. 304, p. 312, said:

"The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither encumber nor transfer that property nor authorize others to do so. The corporation—the artificial being created—holds the property and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law.

"In Smith v. Hurd, 12 Met. 371, 385, the relations of stockholders to the rights and property of a banking corporation are stated with his usual clearness and precision by Chief

Justice Shaw, speaking for the supreme court of Massachusetts, and the same doctrine applies to the relations of stockholders in all business corporations. Said the chief justice: 'The individual members of a corporation, whether they should all join or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account or discharge them from any liability. Should all the stockholders join in a power of attorney to anyone, he could not take possession of any real or personal estate, any security or chose in action; could not collect a debt or discharge a claim, or release damage arising from any default; simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined.' "

While the stockholders do not own the corporate property, they nevertheless control corporate action, and in holding that corporate action approved by the stockholders but not formally acted upon by the directors was valid, Fuller, C. J., in Union Pacific Ry. Co. v. Chicago etc. Ry. Co., 163 U. S. 564, p. 596, said:

"When by the charter of a corporation its powers are vested in its stockholders, and this was the common-law rule when the charter was silent, the ultimate determination of the management of the corporate affairs rests with its stockholders, and the charter of the Pacific Company did not commit the exclusive control to the board of directors."

§ 114. In Jellenik v. Huron Copper Mining Co., 177 U. S. 1, Harlan, J., in holding that stock in a corporation had its situs for the purpose of conferring jurisdiction at the domicile of the company, said (p. 13):

"The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner. This principle is not affected by the fact that the defendant is authorized by the laws of Michigan to have an office in another state at which a book showing the transfers may be kept."

§ 115. In holding that one in whose name stock stood as trustee and by way of collateral security could vote the stock without thereby becoming beneficial owner and liable as such, Bradley, J., in Burgess v. Seligman, 107 U. S. 20 (p. 29), said:

"When the law provides that if a person holds stock as a trustee, or by way of collateral security only, he shall not be personally liable for the company's debts, it supposes that the stock shall be holden and that the pledgee or trustee shall be the holder. If, then, the law is to have any force or effect, the mere fact of holding cannot be set up as a bar or estoppel against proof of the manner and character of such holding. And if such pledgee or trustee may be a holder of the stock in that character, is he bound to be perfectly passive in his holding? He will not be entitled to any dividends or profits, it is true; or if he receives dividends or profits he must account therefor; but is it certain that he may not lawfully vote on the stock? An executor, administrator, guardian or trustee certainly may vote; and where is the rule to be found that a holder for collateral security under a law which permits such holding may not vote on the stock so held without losing his character as a mere pledgee? But as before said, if the pledgee in voting the stock exceeds his rights as such pledgee, it cannot have the effect of making the stock his own."

§ 116. In holding a subscription valid where enough had been done to constitute a contract and that the subscriber was not relieved by the subsequent consolidation of the company with another authorized by the statute at the time of the subscription, Strong, J., in Nugent v. Supervisors, 19 Wall. 241 (p. 247), said:

"The fact that no subscription was formally made upon the books of the company is quite immaterial. . . . . There was not only the resolution declaring the subscription made, but there was an acceptance by the railroad company and notice of the acceptance. The minds of the parties came together."

Again (p. 250):

"In a multitude of cases decided in England and in this country it has been determined that a subscriber for the stock of a company is not released from his engagement to take it and pay for it by any alteration of the organization or

purposes of the company which at the time the subscription was made were authorized either by the general law or by the special charter, and a clear distinction is recognized between the effect of such alterations and the effect of those made under legislation subsequent to the contract of subscription. . . . . They uniformly assert that the subscriber for stock is released from his subscription by a subsequent alteration of the organization or purposes of the company only when such alteration is both fundamental and not provided for or contemplated by either the charter itself or the general laws of the state."

§ 117. In holding that an action lay for the conversion of stock transferred in blank, Waite, J., in McAllister v. Kuhn, 96 U. S. 87, p. 89, said:

"There can be no doubt that shares of stock in a corporation may be transferred by means of an assignment and delivery of certificates. It is true that a certificate of stock is not the stock itself; but it is documentary evidence of title to stock, and may be used for the purposes of symbolical delivery, as the stock itself is incapable of actual delivery. A blank indorsement of a certificate may be filled up by writing an assignment and power of attorney over the signature indorsed, and in this way an actual transfer of the stock on the books of the corporation may be perfected. A wrongful use of such an indorsed certificate for such a purpose may operate as a conversion of the stock."

§ 118. In holding that a transfer of stock is complete when registered on the books of the company irrespective of the stock certificate to which, however, the transferee is entitled, Matthews, J., in National Bank v. Watsontown Bank, 105 U. S. 217, p. 222, said:

"A complete transfer of the title to the stock upon the books of the bank, it is not doubted, would have the effect to vest it in the transferee, free from any claim or lien of the bank. The consent of the bank, made necessary to such transfer, is the waiver of its right, as its refusal would be the assertion of it. The transfer when thus consummated destroys the relation of membership between the corporation and the old stockholder with all its incidents, and creates an original relation with the new member free from all antecedent obligations. This legal relation and proprietary inter-

est on which it is based are quite independent of the certificate of ownership, which is mere evidence of title. The complete fact of title may very well exist without it. All that is necessary, when the transfer is required by law to be made upon the books of the corporation, is that the fact should be appropriately recorded in some suitable register or stock list, or otherwise formally entered upon its books."

§ 119. In holding that a transferee in blank of stock takes subject to liens imposed by statute, Brewer, J., in Hammond v. Hastings, 134 U. S. 401, p. 404, said:

"Repeated efforts have been made to have certificates of stock declared negotiable paper, but they have been unsuccessful. Such a certificate is not negotiable in either form or character; and like every non-negotiable paper, whoever takes it does so subject to its equities and burdens; and though ignorant of such equities and burdens, his ignorance does not relieve the paper therefrom, or enable him to hold it discharged therefrom."

§ 120. In holding that a transfer of stock on the books of a company under and pursuant to a forged transfer in blank was invalid against the true owner, Field, J., in Telegraph Co. v. Davenport, 97 U. S. 369, p. 371, said:

"Forgery can confer no power nor transfer any rights. The officers of the company are the custodians of its stock-books, and it is their duty to see that all transfers of shares are properly made, either by the stockholders themselves or persons having authority from them. If upon the presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in the one case and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility. In many instances they may be misled without any fault of their own, just as the most careful person may sometimes be induced to purchase property from one who has no title and who may perhaps have acquired its possession by force or larceny. Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock nor the good faith of the purchaser of stolen prop-

erty will avail as an answer to the demand of the true owner."

§ 121. In holding a transferee of stock on the books of a company bound to pay unpaid balances on stock, Strong, J., in Webster v. Upton, Assignee, 91 U. S. 64 (p. 67), said:

"Stockholders become such in several ways,—either by original subscription, or by assignment of prior holders, or by direct purchase from the company. An express promise is almost unknown, except in the case of an original subscription; and oftener than otherwise it is not made in that. The subscriber merely agrees to take stock. He does not expressly promise to pay for it. Practically, then, unless the ownership of such stock carries with it the legal duty of paying all legitimate calls made during the continuance of the ownership, the fund held in trust for creditors is only that portion of each share which was paid prior to the organization of the company,—in many cases not more than five per cent; in the present case only twenty. Then the company commences business and incurs obligations, representing all the while to those who deal with it that its capital is the amount of stock taken, when in truth the fund which is held in trust for creditors is only that part of the stock which has been actually paid in. This cannot be. . . . .

"The plain object of the statute, therefore, would be defeated if there was no liability of the stockholder to pay the full prescribed amount of each share of his stock. With this plain object of the legislature in view, it must be assumed, after the verdict of the jury, the defendant voluntarily became a stockholder. Either he must have designed to defeat the legislative intent, or he must have consented to carry it out. The former is not to be presumed, and if the latter was the fact, coming as he did into privity with the company, there is a necessary implication that he undertook to complete the payment of all that was unpaid of the shares he held whenever it should be demanded. To constitute a promise binding in law, no form of words is necessary. An implied promise is proved by circumstantial evidence; by proof of circumstances that show the party intended to assume an obligation. A party may assume an obligation by putting himself into a position which requires the performance of duties. . . . . But if the law implies a promise by the original holders or subscribers to pay the full par value when it may be called, it follows that an assignee of the stock when he has come into privity with the company by having stock

transferred to him on the company's books is equally liable. The same reasons exist for implying a promise by him as exist for raising up a promise by his assignor. And such is the law as laid down by the textwriters generally, and by many decisions of the courts. . . . . In Angell and Ames on Corporations, section 534, it is said: 'When an original subscriber to the stock of an incorporated company, who is so bound to pay the installments on his subscription from time to time, as they are called in by the company, transfers his stock to another person, such other person is substituted not only to the rights, but to the obligations, of the original subscriber, and he is bound to pay up the installments called for after the transfer to him. The liability to pay the installments is shifted from the outgoing to the incoming stockholder. A privity is created between the two by the assignment of the one and the acceptance of the other, and also between them and the corporation; for it would be absurd to say, upon general reasoning, that, if the original subscribers have the power of assigning their shares, they should, after disposing of them, be liable to the burdens which are thrown upon the owners of the stock.'

"So in Redfield on Railways, 53, it is said the cases agree that whenever the name of the vendee of shares is transferred to the register of shareholders, the vendor is exonerated, and the vendee becomes liable for calls. We think, therefore, the transferee of stock in an incorporated company is liable for calls made after he has been accepted by the company as a stockholder and his name has been registered on the stock-books as a corporator; and, being thus liable, there is an implied promise that he will pay calls when made while he continues the owner."

§ 122. In holding a stockholder liable for unpaid installments of stock regardless of agreements or representations to the contrary by the company or its agents, Hunt, J., in Upton v. Tribilcock, 91 U. S. 45, p. 47, said:

"The acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibilities of a shareholder. Brigham v. Mead, 10 Allen, 245; Buff City R. R. Co. v. Douglass, 14 N. Y. 336; Seymour v. Sturges, 26 Id. 134. The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and

for the benefit of its creditors in the event of its dissolution. This duty is a sacred one and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a football to be thrown into the market for the purpose of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has often been attempted, but never successfully. The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid, and carefully to husband it when received. Sawyer v. Hoag, 17 Wall. 610; Tuckerman v. Brown, 33 N. Y. 297; Ogilvie v. Knox Ins. Co., 22 How. 380; Osgood v. Laytin, 3 Keys, 521."

§ 123. In a suit by a judgment creditor to enforce liability of stockholders to whom stock had been issued for property, Coit v. Gold Amalgamating Co., 119 U. S. 343, Field, J., holding the stockholder not liable in the absence of fraud, said:

"The plaintiff contends, and it is the principal basis of his suit, that the valuation thus put upon the property was illegally and fraudulently made at an amount far above its actual value, averring that the property consisted only of a machine for crushing ores, the right to use a patent called the Crosby process, and the charter of the proposed organization; that the articles had no market or actual value, and, therefore, that the capital stock issued thereon was not fully paid, or paid to any substantial extent, and that the holders thereof were still liable to the corporation and its creditors for the unpaid subscription.

"If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the installments has been paid. In that case there is still

a debt due to the corporation, which if it becomes insolvent, may be questioned in equity by the creditors, as a trust fund liable to the payment of their debts. But where full paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud. Boynton v. Hatch, 47 N. Y. 225; Van Cott v. Van Brunt, 82 N. Y. 535; Carr v. Le Fevre, 27 Pa. 413."

Where stock was issued for property fraudulently overvalued, Shiras, J., in holding bona fide creditors entitled to enforce actual payment by the subscribers in Lloyd v. Preston, 146 U. S. 630, said (p. 642):

"It having been found, on convincing evidence, that the overvaluation of the property transferred to the railway company by Harper, in pretended payment of the subscriptions to the capital stock, was so gross and obvious as, in connection with the other facts in the case, to clearly establish a case of fraud, and to entitle bona fide creditors to enforce actual payment by the subscribers, it only remains to consider the effect of the defenses set up."

§ 124. In holding that the unpaid balance of a stock subscription could not be satisfied by setoff of an ordinary debt due by the company to one of its creditors, for the reason that the capital stock of a corporation is a trust fund for the benefit of creditors, Miller, J., in Sawyer v. Hoag, 17 Wall. 610, said (p. 620):

"Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen.

"The principle is fully asserted in two recent cases in this court, namely, Burke v. Smith, 16 Wall. 390, and in New Albany v. Burke, 11 Wall. 96. Both these cases turned upon the doctrine we have stated, and upon the necessary inference from that doctrine that the governing officers of a cor-

poration cannot by agreement or other transaction with the stockholder release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration. . . . . It is very true that by the power of the legislature there is created in all acts of incorporation a legal entity which can contract with its shareholders in the ordinary transactions of business as with other persons. It can buy of them, sell to them, make loans to them, and, in insurance companies, make contracts of insurance with them, in all of which both parties are bound by the ordinary laws of contract. The stockholder is also relieved from personal liability for the debts of the company. But after all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each stockholder is in exact proportion to the amount of his stock. It is therefore but just that when the interest of the public, or of strangers dealing with this corporation, is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to a rigid scrutiny, and if found to be infected with anything unfair toward such third person calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him."

In holding a stockholder of record liable for statutory assessments on the stock, Clifford, J., in Turnbull v. Payson, 95 U. S. 418, said (p. 421):

"Where the name of an individual appears on the stock-book of a corporation as a stockholder, the prima facie presumption is that he is the owner of the stock, in a case where there is nothing to rebut that presumption; and in an action against him as a stockholder, the burden of proving that he is not a stockholder or of rebutting that presumption is cast upon the defendant."

§ 125. In Handley v. Stutz, 139 U. S. 417, it was held that where a corporation, not insolvent but being under the necessity of raising additional capital, increased its capital stock, distributed part of such increased stock gratuitously among its existing stockholders, but sold the balance with bonds at less

than par but at the best price obtainable, the gratuitous distributees were liable as original subscribers, to creditors generally, but the bond and stock purchasers were liable for balances between the sale price and the par value only to creditors who had become such subsequently to the increase of capital stock. Brown, J., in the opinion of the court said (p. 427):

"Ever since the case of Sawyer v. Hoag, 17 Wall. 610, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of stock who did not pay for it in money or other property to pay for the same when called upon by creditors; and that a contract between themselves and the corporation that the stock shall be treated as fully paid and nonassessable, or otherwise limiting their liability therefor, is void as against creditors. The decisions of this court upon this subject have been frequent and uniform, and no relaxation of the general principle has been admitted. Upton v. Tribilcock, 91 U. S. 45; Sanger v. Upton, 91 U. S. 56; Webster v. Upton, 91 U. S. 65; Chubb v. Upton, 95 U. S. 665; Pullman v. Upton, 96 U. S. 328; County of Morgan v. Allen, 103 U. S. 498; Hawkins v. Glenn, 131 U. S. 319; Graham v. Railroad Co., 102 U. S. 148, 161; Richardson v. Green, 134 U. S. 30. . . . .

"If the corporation has no right as against creditors to sell or dispose of this stock with an agreement that no further assessment shall be made upon it, much less has it the right to give it away or distribute it among shareholders without receiving a fair equivalent therefor, and thereby induce the public to deal with it upon the credit of such shares as representing the assets of the corporation. . . . . Somewhat different considerations apply to those who subscribe for the bonds of the company with the understanding that they were to receive an amount of stock equal to the bonds as an additional inducement to their subscription. . . . . The case then resolves itself into the question whether an active corporation or, as it is called in some cases, a 'going concern' finding its original capital impaired by loss or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market, and sell it for the best price that can be obtained. The question has never been directly raised before in this court, and we are not conse-

quently embarrassed by any previous decisions on the point. In the Upton cases, arising out of the failure of the Great Western Insurance Company, in Hatch v. Dana, 101 U. S. 205, and in Hawkins v. Glenn, 131 U. S. 319, the defendants were either original subscribers to the increased stock at a price far below its par value, or transferees of such subscribers; and the stock was issued not, as in this case, to purchase property or raise money to add to the plant, and facilitate the operations of the company, but simply to increase its original stock in order to carry on a larger business, and the stock thus issued was treated as if it formed a part of the original capital. In County of Morgan v. Allen, 103 U. S. 498, the same principle was applied to a subscription by a county to the capital stock of a railroad company, for which it had issued its bonds, although such bonds had been surrendered to the county with the consent of certain of its creditors.

"To say that a corporation may not, under the circumstances above indicated, put its stock upon the market and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below bar. The wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation, in some form, the amount represented by it; but it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and inquire whether its holder, or the person of whom he purchased, has paid its par value for it. It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting them upon the market for the best price that can be obtained; and so long as the transaction is bona fide and not a mere cover for 'watering' the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it. Of course, no one would take stock so issued at a greater price than the original stock could be purchased for, and hence the ability to negotiate the stock and to raise the money must depend upon the fact whether the purchaser shall or shall not be called upon to respond for its par value. While, as before observed, the

precise question has never been raised in this court, there are numerous decisions to the effect that the general rule that holders of stock in favor of creditors must respond for its par value is subject to exceptions where the transaction is not a mere cover for an illegal increase. . . . . We have no doubt the learned circuit judge held correctly that it was only subsequent creditors who were entitled to enforce their claims against these stockholders, since it is only they who could by any legal presumption have trusted the company upon the faith of the increased stock. First National Bank of Deadwood v. Gustin Minerva Consolidated Mining Company, 44 N. W. 198; 2 Morawetz on Corporations, §§ 832–3; Coit v. N. C. Gold Amalgamating Co., 14 Fed. 12. We also agree with him that creditors who became such after the increase was voted in May, 1886, are entitled to look to those who subsequently received the stock, notwithstanding they did not receive it until after the debts had been contracted."

§ 126. In holding that individual liability of stockholders over and above stock subscriptions is entirely a matter of statute, Waite, C. J., in Terry v. Little, 101 U. S. 216, said:

"The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law. The first thing to be determined in all such cases is, therefore, what liability has been created. There will always be difficulty in attempting to reconcile cases of this class in which the general question of remedy has arisen unless special attention is given to the precise language of the statute under consideration. The remedy must always be such as is appropriate to the liability to be enforced. The statute which creates the liability may declare the purposes of its creation and provide directly or indirectly a remedy for its enforcement. If the object is to provide a fund out of which all creditors are to be paid share and share alike, it needs no argument to show that one creditor should not be permitted to appropriate to himself, without regard to the rights of others, that which is to make up the fund."

§ 127. In holding that a bank, pledgee of stock transferred into its name on the books of the corporation, was liable as a stockholder and could not evade that liability by having the stock transferred to a dummy on the books of the company,

Strong, J., in National Bank v. Case, 99 U. S. 628, said (p. 631):

"Such being the facts of the case, there can be no serious controversy respecting the principles of law applicable to them. It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in Pullman v. Upton, 96 U. S. 328; and like decisions abound in the English courts and in numerous American cases, to some of which we refer: Adderly v. Storm, 6 Hill (N. Y.), 624; Roosevelt v. Brown, 11 N. Y. 148; Holyoke Bank v. Burnham, 11 Cush. (Mass.) 183; Magruder v. Colston, 44 Md. 349; Crease v. Babcock, 10 Met. (Mass.) 525; Wheelock v. Kost, 77 Ill. 296; Empire City Bank, 18 N. Y. 199; Hale v. Walker, 31 Iowa, 344. For this several reasons are given. One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder. This subject is well treated in Mr. Thompson's recently published work on 'The liability of stockholders,' where may be found not only a full collection of authorities, but a careful analysis of what the authorities contain. Vide, c. 13.

"When, therefore, the stock was transferred to the Germania Bank, though it continued to be held merely as a collateral security, the bank became subject to the liabilities of a stockholder, and the liability accrued the instant the transfer was made. At that instant the liability of Phelps, McCullough & Co. ceased. We have, then, only to inquire whether the bank succeeded in throwing off that liability by its transfer to its clerk, Waldo. It certainly did not thereby devest itself of its substantial ownership. It is not every transfer that releases a stockholder from his responsibility as such. While it is true that shareholders of the stock of a corporation generally have a right to transfer their shares, and thus disconnect themselves from the corporation and from any responsibility on account of it, it is equally true that there are some limits to this right. A transfer for the mere pur-

pose of avoiding his liability to the company or to its creditors is fraudulent and void, and he remains still liable. The English cases, it is admitted, give effect to such transfers, if they are made, as it is called, 'out-and-out'; that is, completely, so as to devest the transferrer of all interest in the stock. But even in them it is held that if the transfer is merely colorable, or, as sometimes coarsely denominated, a sham,—if, in fact, the transferee is a mere tool or nominee of the transferrer so that as between themselves there has been no real transfer, 'but in the event of the company becoming prosperous the transferrer would become interested in the profits, the transfer will be held for naught and the transferrer will be put upon the list of contributories.' Williams' Case, L. R. 9 Eq. 225, note, where the transfer was, as in the present case, made to a clerk of the transferrer without consideration; Payne's Case, Id. 223; Kintrea's Case, L. R. 5 Ch. 95. See, also, Lindley on Partnership, 2d ed., p. 1352; Chinnock's Case, 1 Johns. Ch. (Eng.) 714; Hyam's Case, 1 De Gex, F. & J. 75; Budd's Case, 3 Id. 296. The American doctrine is even more stringent. Mr. Thompson states it thus, and he is supported by the adjudicated cases: 'A transfer of shares in a failing corporation made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who from any cause is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferrer and the transferee it was out-and-out.' Nathan v. Whitlock, 9 Paige (N. Y.), 152; McClaren v. Franciscus, 43 Mo. 452; Marcy v. Clark, 17 Mass. 329; Johnson v. Laflin, by Dillon, J., 6 Cent. L. J. 131."

§ 128. In holding that preferred stockholders who had become such in lieu of their prior position as creditors had no lien or claim on the corporate property superior to that of creditors under debts contracted by the company subsequently to the issue of preferred stock, and that their only valid claim was one to a priority over the holders of common stock, Blatchford, J., in Warren v. King, 108 U. S. 389, said (p. 396):

"The rights of the holders of preferred stock in this case must be determined by the language of the stock certificate. That is exactly the same as the language of the written instruments which preceded the issuing of the certificates. The shares are shares of the capital stock of the company,

though shares with different privileges from shares of the common stock. The certificate declares the quality of the preferred stock in two respects—(1) its relation to the property of the company; (2) its relation to the net earnings.

"As to the property, it is declared that the preferred stock is to be and remain a first claim on the property of the company 'after its indebtedness.' But it is stock, and part of the capital stock with the characteristics of capital stock. One of such characteristics is that no part of the property of a corporation shall go to reimburse the principal of capital stock until all the debts of the corporation have been paid. It would require the clearest language to admit of the application of a different rule to any capital stock. . . . . There is a unity of right in the claim of the preferred stock on the property of the company and in the title of its holder to receive a share of the net earnings of that property. His proprietorship in those earnings is a right to receive from them so much a year, if earned, before the common stock receives any dividend therefrom. And when the two classes of stock have each received the same specified amount out of the year's net earnings, he has the right to share equally in the surplus with the holder of common stock. Thus he can have no income on his stock unless there are net earnings. Those net earnings are what is left after paying current expenses and interest on debt and everything else which the stockholders, preferred and common, as a body corporate are liable to pay. The holders of preferred stock have the same relation, by virtue of the certificate, to the corpus of the property which they have to its net earnings. Their position in regard to both is one inferior to that of all creditors. . . . . Whatever position the holders of preferred certificates occupied before they accepted preferred stock, whatever special rights of lien they had, they became corporators, proprietors, shareholders, and abandoned the position of creditors, and took up toward existing and future creditors the same position which every stockholder in a corporation occupies toward existing and future creditors. His chance of gain, by the operations of the corporation, throws on him, as respects creditors, the entire risk of the loss of his share of the capital, which must go to satisfy the creditors in case of misfortune. He cannot be both creditor and debtor by virtue of the ownership of stock. In this case, all the parties holding trustees' certificates united to form the new corporation and converted themselves into stockholders in it."

§ 129. In holding that a preferred stockholder was not entitled to dividends until "declared," nor to compel a declaration of dividends without showing abuse of discretion by the directors of the corporation in failing to do so, Harlan, J., in New York etc. R. R. v. Nickals, 119 U. S. 296, said (p. 306):

"A declaration of profits, as in itself and without further action by the directors, entitling shareholders to dividends is unknown in the law or practice of corporations. Dividends are 'declared' by some formal act of the corporation—the question whether there are or are not profits being settled entirely by the accounts of the company as kept by subordinate officers, not by the mere statement of directors as to what appears upon its books. . . . . We are of opinion that while the agreement of 1877 and the articles of association sustain the claim of preferred stockholders to a six per cent dividend in advance of common stockholders, the former are not entitled, of right, to dividends, payable out of the net profits accruing in any particular year, unless the directors of the company formally declare, or ought to declare, a dividend payable out of such profits; and whether a dividend should be declared in any year is a matter belonging in the first instance to the directors to determine, with reference to the condition of the company's property and affairs as a whole. As the evidence shows that the profits for the year ending September 30, 1880, were applied to objects that were legitimate and proper, and as the condition of the company was not such as to make the declaration of a dividend a duty upon the part of the directors, we perceive no ground upon which the claim of the appellees can be sustained."

In holding that certain preferred stockholders were not in a position to question the validity of the contract in question, Bradley, J., in Branch v. Jesup, 106 U. S. 468, said (p. 475):

"The appellants are stockholders of the Atlantic and Gulf Railroad Company. Their stock is a preferred stock, it is true, entitling them to interest on its face before any dividends can be made to the common stockholders. But this is not inconsistent with its being stock.

"It is a very common thing in this country to issue stock of this kind. The interest accruing thereon is in the nature of a preferred dividend, and is sometimes so called. Though after it has accrued it may become a debt, so also does a dividend become a debt after it has been declared and has

become payable. It has no priority over other debts, if, indeed, it has an equality with them."

§ 130. In holding that stock dividends, i. e., dividends declared and distributed in stock of the company, are an accretion to the principal, not the income of an estate held in trust, Gray, J., in Gibbons v. Mahon, 136 U. S. 549, said (p. 557):

"The distinction between the title of a corporation and the interest of its members or stockholders in the property of a corporation is familiar and well settled. The ownership of that property is in the corporation and not in the holders of shares of its stock. The interest of each stockholder consists in the right to a proportionate part of the profits whenever dividends are declared by the corporation during its existence under its charter, and to a like proportion of the property remaining, upon the termination or dissolution of the corporation after payment of its debts. Van Allen v. Assessors, 3 Wall. 573, 584; Delaware Railroad Tax, 18 Wall. 206, 230; Tennessee v. Whitworth, 117 U. S. 129, 136; New Orleans v. Houston, 119 U. S. 265, 277. Money earned by a corporation remains the property of the corporation, and does not become the property of the stockholders unless and until it is distributed among them by the corporation. The corporation may treat it and deal with it either as profits of its business or as an addition to its capital. Acting in good faith and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income; or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years; or it may retain portions of its earnings and allow them to accumulate, and then invest them in its own works and plant, so as to secure and increase the permanent value of its property. Which of these courses shall be pursued is to be determined by the directors, with due regard to the condition of the company's property and affairs as a whole; and, unless in case of fraud or bad faith on their part, their discretion in this respect cannot be controlled by the courts, even at the suit of owners of preferred stock, entitled by express agreement with the corporation to dividends at a certain yearly rate 'in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year as declared by the board of directors.' New York, Lake Erie & Western R. R. v. Nickals, 119 U. S. 296, 304, 307.

"Reserved and accumulated earnings, so long as they are held and invested by the corporation, being part of its corporate property, it follows that the interest therein, represented by each share, is capital and not income of that share as between the tenant for life and the remainderman, legal or equitable thereof.

"Whether the gains and profits of a corporation should be so invested and apportioned as to increase the value of each share of stock, for the benefit of all persons interested in it, either for a term of life or of years, or by way of remainder in fee, or should be distributed and paid out as income to the tenant for life or for years, excluding the remainderman from any participation therein, is a question to be determined by the action of the corporation itself at such times and in such manner as the fair and honest administration of its whole property and business may require or permit, and by a rule applicable to all holders of like shares of its stock; and cannot, without producing great embarrassment and inconvenience, be left open to be tried and determined by the courts as often as it may be litigated between persons claiming successive interests under a trust created by the will of a single shareholder and by a distinct and separate investigation, through a master in chancery or otherwise, of the affairs and accounts of the corporation, as of the dates when the provisions of the will of that shareholder take effect and with regard to his shares only.

"In ascertaining the rights of such persons the intention of the testator, so far as manifested by him, must of course control; but when he has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares.

"Therefore, when a distribution of earnings is made by a corporation among its stockholders, the question whether such distribution is an apportionment of additional stock representing capital or a division of profits and income depends upon the substance and intent of the action of the corporation as manifested by its vote or resolution; and ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income of each share.

"A stock dividend really takes nothing from the property of the corporation and adds nothing to the interests of the

shareholders. Its property is not diminished and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares and the proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones."

§ 131. In holding that where the directors of a bank refused to resist the collection of a tax imposed on the bank by the state in violation of its contract with the bank, an individual stockholder in a suit, making the bank, its directors and the tax collector parties defendant, was entitled to an injunction, Wayne, J., in Dodge v. Woolsey, 18 How. (U. S.) 331, said (p. 341):

"It is now no longer doubted either in England or the United States that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into and to enjoin, as the case may require that to be done, any proceedings by individuals in whatever character they may profess to act if the subject of complaint is an imputed violation of a corporate franchise or the denial of a right growing out of it, for which there is not an adequate remedy at law. Cunliffe v. Manchester and Bolton Canal Co., 2 Russ. & Mylne Ch. R. 480n; Ware v. Grand Junction Water Co., 2 Russ. & Mylne, 470; Bayshaw v. Eastern Counties Ry. Co., 7 Harr. Ch. R. 114; Angell & Ames, 4th ed., 424, and the other cases there cited. . . . .

"The result of the cases is well stated in Angell & Ames, paragraphs 391, 393: 'In cases where the legal remedy against a corporation is inadequate, a court of equity will

interfere, is well settled, and there are cases in which a bill in equity will lie against a corporation by one of its members.' 'Though the result of the authorities clearly is, that in a corporation, when acting within the scope of and in obedience to the provisions of its constitution, the will of the majority, duly expressed at a legally constituted meeting, must govern, yet beyond the limits of the act of incorporation the will of the majority cannot make an act valid; and the powers of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporations are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be observed that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension or simple negligence on the part of the directors.' ''

§ 132. In holding that the corporation must be made party defendant in a suit by a stockholder to restrain the collection of a tax, and on that ground sustaining the demurrer to the bill, Davis, J., in Davenport v. Dows, 18 Wall. 626, said:

''That a stockholder may bring a suit when a corporation refuses is settled in Dodge v. Woolsey, but such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly, the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted, the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit involving precisely the same subject matter. To avoid such a result a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation.''

§ 133. In holding that there must be a real persistent refusal to perform their duty or wrong done to the corporation

in order to justify a stockholder in bringing suit in lieu of a corporation to enforce a corporate right against a third party, Miller, J., in Hawes v. Oakland, 104 U. S. 450, said (p. 452):

"Since the decision of this court in Dodge v. Woolsey (18 How. 331), the principles of which have received more than once the approval of this court, the frequency with which the most ordinary and usual chancery remedies are sought in the federal courts by a single stockholder of a corporation who possesses the requisite citizenship in cases where the corporation whose rights are to be enforced cannot sue in those courts seems to justify a consideration of the grounds on which that case was decided and of the just limitation of the exercise of those principles. . . . . That the vast and increasing proportion of the active business of modern life which is done by corporations should call into exercise the beneficent powers and flexible methods of courts of equity is neither to be wondered at nor regretted; and this is especially true of controversies growing out of the relations between the stockholder and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees and in preventing their exercise, in the name of the corporation, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial and is undisputed. These are real contests, however, between the stockholder and the corporation of which he is a member. . . . .

"The principle involved in the case of Dodge v. Woolsey permits the stockholder in one of these corporations to step in between that corporation and the party with whom it has been dealing, and institute and control a suit in which the rights involved are those of the corporation, and the controversy is one really between that corporation and the other party, each being entirely capable of asserting its own rights. This is a very different affair from a controversy between the shareholder of a corporation and that corporation itself or its managing directors or trustees, or the other shareholders, who may be violating his rights or destroying the property in which he has an interest. Into such a contest the outsider, dealing with the corporation through its managing agents in a matter within their authority, cannot be dragged, except where it is necessary to prevent an absolute failure of justice in cases which have been recognized as exceptional in their character and calling for the extraordinary

powers of a court of equity. It is therefore always a question of equitable jurisprudence, and as such has within the last forty years received the repeated consideration of the highest courts of England and of this country. . . . .

"This examination of Dodge v. Woolsey satisfies us that it does not establish, nor was it intended to establish, a doctrine on this subject different in any material respect from that found in the cases in the English and in other American courts, and that the recent legislation of Congress referred to leaves no reason for any expansion of the rule in that case beyond its fair interpretation.

"We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction completed or contemplated by the acting managers in connection with some other party, or among themselves or with other shareholders, as will result in serious injury to the corporation or to the interests of the other shareholders; or where the board of directors or a majority of them are acting for their own interest, in a manner destructive of the corporation itself or of the rights of the other shareholders; or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

"Possibly other cases may arise in which to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

"But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances or action in conformity with his wishes. He must make an earnest,

not a simulated, effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body in the matter of which he complains; and he must show a case, if this is not done, where it could not be done or it was not reasonable to require it.

"The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit."

§ 134. In stating the position of stockholders and bondholders occupying the position of promoters, Brown, J., in Dickerman v. Northern Trust Co., 176 U. S. 181, said (p. 203):

"Somewhat different considerations apply to those who took part in the organization of the company and in the purchase of the thirty-nine mills, and who received the bonds and stock of the paper company with notice of the fraudulent character of the scheme. We are not disposed to condone the offenses of those who, through Beard and Ramsdell and their assignee Stein, as their agents, purchased these plants for $2,788,000, and immediately thereafter went through the form of repurchasing of their own agents (in fact, of themselves) the same properties at $5,000,000. These men stood in the light of promoters of the Straw Paper Company. A promoter is one who 'brings together the persons who become interested in the enterprise, aids in procuring subscriptions and sets in motion the machinery which leads to the formation of the corporation itself.' Cook on Stock and Stockholders, sec. 651. Or, as defined by the English statute of 7 & 8 Vict., chapter 110, section 3, 'Every person acting by whatever name in the forming and establishing of a company at any period prior to the company' becoming fully incorporated. See, also, Lloyd on Corporate Liability for Acts of Promoters, 17. He is treated as standing in a confidential relation to the proposed company, and is bound to the exercise of the utmost good faith.

Lloyd's Corporate Liability, 18; Densmore Oil Co. v. Densmore, 64 Pa. 43; Bosher v. Land Co., 89 Va. 455. The promoter is the agent of the corporation and subject to the disabilities of an ordinary agent. His acts are scrutinized carefully, and he is precluded from taking a secret advantage of the other stockholders. Cook on Stock and Stockholders, sec. 651. 'Accordingly, it has been held that, if persons start a company, and induce others to subscribe for shares, for the purpose of selling property to the company when organized, they must faithfully disclose all facts relating to the property which would influence those who form the company in deciding upon the judiciousness of the purchase. If the promoters are guilty of any misrepresentation of facts, or suppression of the truth in relation to the character and value of the property or their personal interest in the proposed sale, the company will be entitled to set aside the transaction or recover compensation for any loss which it has suffered.' Morawetz on Corporations, secs. 291, 294, 546; New Sombrero Phosphate Co. v. Erlanger, 5 Ch. Div. 73; Bagnall v. Carlton, 6 Ch. Div. 371; Emma Silver Mining Co. v. Grant, 11 Ch. Div. 918.

" 'In those cases where the scheme of organization gives the promoters the power of selecting the directors who are to represent the company in the proposed purchase, they are bound to select competent and trustworthy persons who will act honestly in the interest of the shareholders. A purchase made from the promoters under these circumstances will not bind the company unless it was a fair and honest bargain.' Morawetz on Corporations, sec. 546; The New Sombrero Phosphate Co. v. Erlanger, L. R. 5 Ch. Div. 73; Brewster v. Hatch, 122 N. Y. 349; Simons v. Vulcan Oil & Mining Co., 61 Pa. 202; Twycross v. Grant, L. R. 2 C. P. Div. 469, 503; Whaley Bridge Calico Printing Co. v. Green, L. R. 5 Q. B. Div. 109, 111; Thompson on Liability of O. & A. 218, sec. 20."

VOTING BY PROXY AND VOTING TRUSTS.

§ 135. The charter of a corporation, whether general or special, is a regulation of status, and the incorporators, by accepting the franchise in the particular instance, adopt the status thereby conferred. This new status thus adopted carries with it both rights and duties of the several individuals in relation to each other and to the corporation. Of the most im-

portant is the right and duty to participate in the control and management of the corporation by voting in elections of officers and upon the adoption of measures. This is clearly apparent to all in the case of a public or political corporation. It is none the less true in the case of a corporation for economic as distinguished from political purposes—in the nature of things, not less true of an incorporated business concern than of a municipality.

§ 136. It is of some considerable importance to bear this in mind, for the fact is often lost to view that a stockholder in a corporation has anything more than an ordinary property interest therein, which he is at liberty to deal with as suits his pleasure. To be sure, as any valuable interest may be considered property, so may the stockholder's status and interest in the corporation, but it is a peculiar property, a participation in the corporate franchise, carrying with it duties as well as rights. Of these the most important is that of voting, which is both a right and a duty, not to be regarded purely from the standpoint of the individual concerned. The control of the corporation is in the majority of the individual units, and thus the exercise of discretion by the individual is a contributing factor, important to himself and to all the individuals concerned in the corporation. This power of voting, both in the public and private corporation, is a delegated power of discretion, and must be personally exercised on the principle, "Delegata potestas non potest delegari."

This rule has been strictly adhered to in public corporations, and the citizen can lawfully vote in a municipal election only in person. The reasons for the rule in the public corporation apply with equal, if not greater, force in case of the private business corporation, where the stockholder always has a stake in the successful conduct of the corporation, which is not universally true of citizen voters. In the long run, the judgment of the few has been found by experience to be inferior to that of the many, and in municipal and city governments oligarchies have been replaced by democracies, founded principally on an inalienable right of franchise in the citizen voter.

§ 137. At the common law, voting by proxy was no more recognized or permitted in the private corporation than in the public corporation, but the rule was relaxed by the courts, and finally the various state legislatures expressly authorized stockholders in private corporations to vote by proxy. As a consequence, voting by proxy is now very general in the larger corporations, and with the voting trusts has resulted in the control of the business corporations being wrested away from the real stockholders into the hands of little oligarchies of manipulating financiers.

In Taylor v. Griswold (1834), 14 N. J. L. 223, it was held that a by-law authorizing voting by proxy was void, and that each stockholder was entitled to one vote and no more. Hornblower, C. J., said:

"When the Crown creates a corporation, it grants to it by implication all powers that are necessary for carrying into effect the object for which it was created. This is according to the legal principle expressed in the maxim, 'Qui concedit aliquid concedere videtur et id, sine quo res ipsa non potest.' 11 Co. 52. It is therefore incidental to every corporation to have the power of making by-laws, regulations and ordinances relative to the purposes for which it was instituted. Sutton's Hosp. Case, 10 Co. 31b; Norris v. Stapps, Hob. 211; City of London v. Vanacker, 1 Ld. Raym. 496; Rex v. Westwood, 7 Bing. 1; S. C., 20 Eng. Com. Law Rep. 1159; Company of Feltmakers v. Davis, 1 Bos. & Pul. 100; Rex v. Lyme Regis, Doug. 158. But this incidental power of legislation is limited not only by the terms of the charter according to the maxim, 'Expressum facit cessare tacitum' (Co. Lit. 210a), but by the spirit and design of the charter, the purpose for which it was created, the object which the crown or the legislature had in view, and the general principles and policy of the common law. Angell & Ames on Corporations, 184, and cases there cited. Sutton's Hosp. Case, 10 Co. 30; Child v. Hudson Bay Co., 2 P. Wms. 207; People v. Utica Ins. Co., 15 Johns. 383; Firemen's Ins. Co. v. Ely, 2 Cow. 699; People v. Tibbits et al., 2 Cow. 358; People v. Kip et al., 4 Cow. 382, note; Angell & Ames on Corporations, 188, sec. 4.

§ 138. "If, in view of these first and elementary principles, we repeat the question whether the right to make a by-law dispensing with the personal attendance of members and permitting them to appear and vote by proxy is incident to a cor-

poration, the answer must be in the negative. Such a power is not essential, nor even apparently necessary, to carry into effect the objects for which corporations are generally created. If the question is again asked in reference to this particular corporation, the same answer must be given, and more emphatically for the same reason. 'The true test of all by-laws,' says Mr. Justice Wilmot, 'is the intention of the crown in granting the charter and the apparent good of the corporation.' Rex v. Spencer, 3 Burr. Rep. 1838. What, then, was the object and design of the legislature in creating this corporation? That it was not for the purpose of instituting a stock company merely or principally for the acquisition of property will appear in the sequel of this investigation. But it was to enable the owners or lessees of certain existing property, in the preservation and good management of which the public had a deep and important interest, to adopt such measure as would give permanency and security to the institution and be calculated to promote their own and the public benefit. If, from the nature of things, this charter would be inoperative, or in any measure fail to effect or secure the benign objects the legislature had in view, unless we annex to it the power of making such a by-law as the one under consideration, then it follows that the corporation has the power by implication and as an incident to the charter. But that the right of voting by proxy is essential to the attainment of the object and design of the charter will not be seriously pretended. If we test the validity of the by-law in question, or the incidental right of the corporation to make it, by the latter branch of the rule just quoted, viz., 'the apparent good of the corporation,' the claim will be found equally untenable. It may be for the personal convenience of members, but it cannot be for the good of the corporation, that its business or election should be conducted by proxies. The interest of the company, the good of the public, would be better promoted and more effectually secured by the personal attendance of, and mutual interchange of, opinions among the members than by the action of proxies. At least, this is the fair and legal presumption. If one member may appear and vote by proxy at elections and on other matters of vital importance to the institution, then all may, and so the welfare and interest of the company and the public be utterly neglected. In short, so far from its being incident to a corporation to make such a regulation, it is at variance with the spirit and 'with the fundamental principles of our civil and political institutions.' And it is confidently believed that not an authority can be found nor a case produced in support of the position that the

right of making such a by-law is incident to a corporation of any description, public or private. Speculations upon the evil consequences that have resulted to many of our incorporated institutions, and especially to our banks, by this and other innovations upon the salutary principles and rules of the common law do not become this place or occasion; but may well deserve the grave consideration of another department of the government."

§ 139. And upon the question whether one member or stockholder was entitled to more than one vote:

"The charter, if not in terms, yet in its spirit and legal intendment, gives each member the same rights and consequently but one vote; whereas this by-law gives them unequal rights and an unequal number of votes. It makes one a member for one purpose and another a member for another purpose. It imposes a test or qualification unknown to the charter, by which to determine how many votes a member may give—whether one, five, ten or fifty. In short, a by-law excluding a member from office, or from the right to vote at all unless he owns five or ten or twenty shares, would not be a more palpable, though it might be a more flagrant, violation of the charter. A man with one share is as much a member as a man with fifty; and it is difficult to perceive any substantial difference between a by-law excluding a member with one share from voting at all and a by-law reducing his one vote to a cipher, by giving another member fifty or a hundred votes."

Again: "Finally, the by-law in question is not authorized by the charter; is inconsistent with the popular spirit and design of the institution; is not essential or necessary to effect the object the legislature had in view; is contrary to the great principles and policy of our laws; and is not even for the apparent good of the company itself. It is therefore void. The object of the legislature was to give permanency and protection to the public improvements that had been erected, and security to the individuals who had embarked in the enterprise. Instead of promoting and securing these legitimate designs, the tendency—at least the apparent tendency—of the by-law in question is to encourage speculation and monopoly, to lessen the rights of the smaller stockholders, depreciate the value of their shares, and throw the whole property and government of the company into the hands of a few capitalists; and it may be to the utter neglect or disregard of the public convenience and interest. I do not say that such was the design, or that such has been the effect, but only that the natural or

probable tendency of the by-law in question is to produce such a result." (Pemberton v. Allen, Davis Rep. 116 (Eng. 1607), Attorney General v. Scott, 1 Ves. 413 (Lord Hardwicke, 1750), Phillips v. Wickham, 1 Paige Rep. 590 (Ch. Walworth, N. Y.), cited in support; State v. Tudor, 5 Day's Rep. (Conn.) contra.)

§ 140. Craig v. First Presbyterian Church (1878), 88 Pa. 42: The right of voting at an election of an incorporated company by proxy is not a general right, and the party who claims it must show a special authority for that purpose (citing Taylor v. Griswold).

People v. Twaddell (1879), 18 Hun, 427: Held, following Phillips v. Wickham, that the right of voting by proxy is not a general right, and the party who claims it must show a special authority for that purpose.

Commonwealth v. Bringhurst (1883), 103 Pa. 134: Members of a corporation may not vote by proxy unless authorized by charter or by-law.

McKee v. Home Savings & Trust Co. (1904), 122 Iowa, 731: Held, that a stockholder could vote by proxy only when authorized by statute, articles or by-laws, and then only upon matters specified in the proxy.

In Detwiller v. Commonwealth (1890), 131 Pa. 614, in holding that in absence of statute a by-law allowing one vote for every ten shares and also voting by proxy is reasonable and binding, Williams, J., citing no cases, said:

"A corporation is a voluntary association of persons engaged in a common enterprise. When the methods of voting are not fixed by general law, the corporators may make the law for themselves, subject to the qualification that such laws and regulations as they make shall not conflict with the laws of the state or of the United States. The general law did not touch either of the questions now raised, and for that reason the corporators or stockholders took them up and made a law for themselves covering both subjects. They have provided that stockholders shall have one vote for each share held by them up to ten shares, and they have fixed the proportion which his votes shall bear to his shares above that number. This is a reasonable regulation. It is uniform in its action, it conflicts with no law, and it is binding on all the

shareholders. The same thing may be said in regard to voting by proxy."

In People v. Crossley (1873), 69 Ill. 195, where the charter of a benevolent society authorized the society to elect its "directors or managers at such time and place and in such manner as may be specified in its by-laws," held, a by-law authorizing voting by proxy valid. Sheldon, J., in delivering the opinion of the court, said, after stating the decisions in Taylor v. Griswold and The State v. Tudor:

"The rule of the latter case appears to be one promotive of convenience, and has to recommend it that it allows members of a private corporation instituted for merely private purposes to regulate their manner of voting in a way to suit their own sense of convenience and interest. In view of the statutory authority to elect the directors in such manner as might be specified in the by-laws of the society, we are disposed to concur with the latter authority above cited, and hold the by-law authorizing the voting by proxy in elections to be valid, especially so in view of section 3, article II of the present constitution of the state, which directs that 'The General Assembly shall provide by law, that in all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote in person or by proxy, for the number of shares of stock owned by him for as many persons as there are directors or managers to be elected or to cumulate said shares.' "

In Market St. Ry. Co. v. Hellman (1895), 109 Cal. 571, in holding that voting by proxy to authorize a bond issue, under a by-law and code provision authorizing and recognizing voting by proxy, was valid and effectual, Searls, C., said:

"The modern law-writers upon corporations without exception, so far as we have observed, recognize the right of a private corporation, in the absence of any statute on the subject, to provide by by-law for the stockholders to vote by proxy. Taylor, at section 579, of his work on Corporations, says: 'It is held that stockholders have no implied right to vote by proxy, but it is competent for a corporation by a by-law to authorize votes to be cast in that manner'; citing People v. Crossley, 69 Ill. 195; State v. Tudor, 5 Day, 329."

§ 141. It is generally conceded that a proxy is always revocable, though in terms made irrevocable. In Schmidt v. Mitchell (1897), 101 Ky. 570, in holding that a proxy given by

one of several executors, to remain in force until revoked by him, does not prevent its revocation by another executor, Du Relle, J., said:

"Nor can we concur in the contention that the provision in the proxy given to Dietz by Lowman, that it should remain in force until 'revoked by me by giving the secretary of said company notice over my own signature that it had been revoked,' rendered the proxy irrevocable except in the mode prescribed. 'A proxy is always revocable. Even when by its terms it may be irrevocable, the law allows the stockholder to revoke it.' 1 Cook, Stock, Stockh. & Corp. Law, § 610. A proxy-holder is a mere agent. His powers exist only at the will of his principal and may be revoked by the latter at any time."

In Woodruff v. Dubuque & S. C. R. Co. (1887), 30 Fed. 91, it was held that a stockholder, who with others constituting a majority had deposited his stock with bankers, authorizing them under an agreement to dispose of the stock and to vote it, remained the owner until sale of the stock, with right to control the vote on it, and therefore to revoke the proxy. Cook, § 610.

In Cone v. Russell, 48 N. J. Eq. 208, it was held that a proxy, irrevocable in terms for five years, given by executors and trustees holding stock as such was revocable, as being otherwise both contrary to public policy and a breach of trust.

§ 142. In New York an irrevocable proxy is prohibited by statute, and a proxy, though irrevocable in terms, given with a pledge of stock as collateral is revocable (In re Germicide Co., 65 Hun, 206; In re Glen Salt Co., 17 App. Div. 234); but where stock was issued to two jointly, an irrevocable proxy by one to the other was upheld, on the ground that otherwise the stock could not be voted anyway without mutual assent. (Hey v. Dolphin, 92 Hun, 230.)

On the other hand, there is more recent authority for the proposition that a proxy, irrevocable in terms, where coupled with an interest and appearing to be for a purpose not illegal or contrary to public policy for some special reason, is valid. (Chapman v. Bates, 61 N. J. Eq. 658; Mobile etc. Co. v. Nicholas, 98 Ala. 92; Whitehead v. Sweet, 126 Cal. 67; Clowes v. Miller, 60 N. J. Eq. 179; Gage v. Fisher, 5 N. D. 297.)

VOTING TRUSTS.

§ 143. Shrewd managers of corporations have resorted to various devices to enable them to sell to the public a majority of the stock and at the same time retain control in themselves, usually for the ostensible benefit of the corporation, sometimes for its real better management, and oftentimes, if not quite always, for the incidental main purpose of their own enrichment.

Cook on Corporations, sixth edition, section 622, says:

"The control of a corporation generally determines its success or failure. The control also gives power, patronage, perquisites, salaries and position. Hence it is sought for. In a large corporation the absolute control generally requires more money than one man is able or willing to invest, consequently for many reasons several unite to obtain and retain the control. There is always danger, however, that some of these stockholders may die or sell their stock, or unite with some other parties to obtain control. Hence for twenty years last past the business community and the lawyers have been trying to find some legal way of so tying up a majority of the stock of a corporation as to prevent its being lost."

An obvious method adopted in certain cases is for the majority to agree for a certain period to vote as a unit. Difficulty of enforcement was one serious objection to this.

With the recognition of voting by proxy, attempts were made to retain control of the corporation by taking irrevocable proxies. These, however, were not countenanced by the courts, and were held invalid, and in some cases, e. g., in New York, were prohibited by statute.

§ 144. Finally, the plan was devised of transferring the stock to trustees for a certain period under a voting trust agreement, the trustees issuing beneficial stock trust certificates to the real owners. This plan had the merit, from the manager's standpoint, of giving the trustees the nine points' advantage of possession. This was early condemned and repudiated by the courts of Connecticut and New Jersey as contrary to public policy, and void per se, on the ground that it took the control and exercise of discretionary voting power from those

beneficially interested, vesting it in the hands of a few in a measure adversely interested, and opening wide the door to fraudulent practices, manipulation and monopoly, in the long run contrary to the public good, whatever the apparent temporary benefit. This attitude has been strongly approved for clearly and forcibly stated reasons and weighty considerations by the courts of North Carolina and Georgia.

In New York, voting trusts are expressly authorized by statute for a limited period of five years. In other states, e. g., Massachusetts, Virginia, Maine, California and Washington, voting trusts are held not void per se, and are countenanced where the apparent benefit, in the opinion of the court, warrants recognition. Nowhere, however, is the reasoning of the Connecticut and North Carolina courts answered, voting trusts, where countenanced, being merely declared, without more, not to be contrary to public policy.

In the Massachusetts and Virginia cases the voting trust is supported on the grounds merely that the majority may agree to act together, and that the right to vote incident to stock is a beneficial property right, and therefore the voting trust is an active trust and not a dry trust.

First, assuming it to be true that a majority may agree to act together, it by no manner of means follows from that premise that the majority may agree to follow the dictates of one or more for a period of time, subordinating their own discretion and judgment.

Secondly, no one will deny that, as Mr. Cook says, the "control of a corporation gives power, patronage, perquisites, salaries and position," and that the right to vote is a beneficial interest and a voting trust an active trust, and still no answer is made to the contention that the voting trust separates the voting control of the corporation from the beneficial ownership, substantially speaking, of the corporation.

§ 145. In Bostwick v. Chapman (the Shepaug Voting Trust Cases), 60 Conn. 553, in holding that a voting trust, created by a majority of the stockholders vesting their legal title to their stock in a trust company for five years to vote on the

stock, was void on the ground that it was against public policy for the voting power to be separated from the beneficial interest, Robinson, J., said:

"It is the policy of our law that an untrammeled power to vote shall be incident to the ownership of the stock; and a contract by which the real owner's power is hampered by a provision therein that he shall vote just as somebody else dictates is objectionable. I think it against the policy of our law for a stockholder to contract that his stock shall be voted just as someone who has no beneficial interest or title in or to the stock directs; saving to himself simply the title, the right to dividends, and perhaps the right to cast the vote directed, willing or unwilling, whether it be for his interest, for the interest of other stockholders, or for the interest of the corporation, or otherwise. This I conceive to be against the policy of the law, whether the power so to vote be for five years or for all time. It is the policy of our law that ownership of stock shall control the property and management of the corporation, and this cannot be accomplished, and this good policy is defeated, if stockholders are permitted to surrender all their discretion and will in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent, who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation. And this is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which each stockholder owes his fellow-stockholder to so use such power and means as the law and his ownership of stock give him that the general interest of stockholders shall be protected and the general welfare of the corporation sustained, and its business conducted by its agents, managers and officers, so far as may be, upon prudent and honest business principles, and with just as little temptation to, and opportunity for, fraud and the seeking of individual gains, at the sacrifice of the general welfare, as is possible."

To the same effect, Kreissl v. Distilling Co., 61 N. J. Eq. 5; Harvey v. Linville Improv. Co., 118 N. C. 693; White v. Thomas Inflatable Tire Co., 52 N. J. Eq. 183; Bridgers v. Staton, 150 N. C. 216; Sheppard v. Rockingham Power Co., 150 N. C. 776; Bridgers v. First Nat. Bank, 152 N. C. 293; Warren v. Pine, 66 N. J. Eq. 353.

§ 146. In Morel v. Hoge (1908), 130 Ga. 625, it was held that an agreement made antecedent to the formation of a company that certain stockholders subscribing to fifty per cent of the capital stock should indefinitely control the company, naming three out of five directors, was void, as against public policy, in that it deprived the majority of control. Fish, C. J., after citing with approval, among others, Shepaug Voting Trust Cases, 60 Conn. 579, Cone v. Russell, 48 N. J. Eq. 208, White v. Thomas Inflatable Tire Co., 52 N. J. Eq. 178, Harvey v. Linville Improv. Co., 118 N. C. 693, said:

"We are aware that there are some cases in which a contrary principle is announced, but in our opinion the cases cited announce the better doctrine. . . . . Our conclusion is that the contract set up by the respondents to the rule as cause why mandamus absolute should not be granted is against public policy, and therefore void, because it indefinitely deprives the owners of the stock constituting the Hilton faction, though they have a majority of the stock, of the power to exercise their right, as well as their duty, to the stockholders, present or future, and to the public, to so vote in the election of directors for the company as will, in their judgment, promote its prosperity and best enable it to perform its duties to the public, and because it gives the shareholders of the Morel faction, even though they may own but a small minority of the stock, the right to indefinitely control the affairs of the corporation, including the right to fix the compensation of its officers and agents and to fill any of such positions from among its own members."

§ 147. In Smith v. San Francisco & N. P. Ry. Co. (1897), 115 Cal. 584, it was held that an agreement by several persons purchasing stock of the company to vote the whole as a unit for five years was valid and not contrary to public policy. Harrison, J., in the opinion of the court, held the agreement valid, as not being in restraint of trade, and on the ground that it is neither illegal nor against public policy to separate the voting power from the beneficial interest of stock, citing in support of this position, among others, the Shepaug Voting Trust Cases, 60 Conn. 553. Beatty, C. J., dissented, saying:

"There is not time at my command to go over the decisions, but I am satisfied that the weight of authority is against the validity of any contract by which the sole owner of stock parts irrevocably with the right to vote it with the effect of putting a minority in control of the corporation."

In Mobile & O. R. Co. v. Nicholas (1893), 98 Ala. 92, a voting trust, created by the stockholders executing an irrevocable power of attorney or proxy to trustees to vote the stock until debenture bonds should be paid, was held valid, Coleman, J., without citation of the cases, saying:

"We have examined case after case, and find generally that the agreements declared void by the courts, where the power to vote was separated from the stockholder and vested in third persons, were under circumstances which showed that the purpose to be accomplished was unlawful—such as the courts would not sanction if the principal had voted and not a proxy; and in case of a mere dry trust, it is held that the stockholder might revoke a power of attorney in form irrevocable. . . . . Tested by any principle of law, legal or equitable, the agreement was not only valid, but fair, at least, to the corporation company and stockholders."

In Faulds v. Yates (1870), 57 Ill. 416, it was held that an agreement between stockholders owning a majority of the stock to vote their stock as a unit for directors was, under the circumstances of that case, valid, Thornton, J., stating the ground of decision as follows:

"The agreement in this case was not for the injury of the minority stockholders. It could not have been so intended, and we cannot perceive that it could so operate. . . . . A careful reading of the contract shows no hidden advantage intended, no fraud, no dishonesty."

§ 148. In Brightman v. Bates (1900), 175 Mass. 105, a syndicate agreement for the purchase of stock in a company, containing the clause that the stock "shall be voted at each annual meeting" for three years for a board of directors named by the committee, assuming that it was to be carried out by placing the stock in trustees under a voting trust agreement, was held valid; Holmes, C. J., said:

"We know nothing in the policy of our law to prevent a majority of stockholders from transferring their stock to a

trustee with unrestricted power to vote upon it. Brown v. Steamship Co., 5 Blatchf. 525, 527, Fed. Cas. No. 2025. See Green v. Nash, 85 Me. 148, 26 Atl. 1114. Supposing that the committee had been trustees, what would the syndicate agreement have amounted to then? Merely an agreement by each of the trustees to vote as they should jointly agree to vote, and an agreement by the subscribers not to demand back their shares for three years. The latter term is not illegal, whether valid or not. A stockholder has a right to put his shares in trust, whatever his motive. If the trust is an active one, he cannot terminate it at will; and the attempt to cut himself off by contract, instead of by the imposition of duties from ending it, certainly is not enough to poison the covenant with the plaintiff. See Williams v. Montgomery, 148 N. Y. 519, 525, 43 N. E. 57. It might be held that the duty of voting incident to the legal title made such a trust an active one in all cases. As to the arrangement for the trustees uniting to elect their candidates, the decisions of other states show that such arrangements have been upheld, and we do not think it needs argument to prove that they are lawful. If stockholders want to make their power felt, they must unite. There is no reason why a majority should not agree to keep together. Faulds v. Yates, 57 Ill. 416; Smith v. Railway Co., 115 Cal. 584, 57 Pac. 582, 35 L. R. A. 309; Havemeyer v. Havemeyer, 43 N. Y. Super. Ct. 506, 512, 513, affirmed according to Beach Priv. Corp., § 504, note 6, and Fisher v. Bush, 35 Hun, 641, in 86 N. Y. 618. See Brown v. Steamship Co., 5 Blatchf. 525, 527, Fed. Cas. No. 2025."

In Williams v. Montgomery, 148 N. Y. 519, it was merely held that an agreement to deposit certain stock in a trust company and not withdraw it for six months was valid.

In Brown v. Pacific Mail Steamship Co. (1867), Fed. Cas. No. 2025, Blatchford, J., held an agreement not to sell certain stock for a certain period, with a power of attorney in terms irrevocable but really revocable at any time, not "contrary to public policy or anywise open to objection." No discussion of authorities or principles.

In Fisher v. Bush, 35 Hun, 641, it was held that an agreement not to sell stock nor vote the same by proxy was without consideration, and also void as against public policy.

In Greene v. Nash (1892), 85 Me. 148, the court refused to rescind a deposit of stock with voting trustees by the duly authorized attorney of the stockholder, the voting trust agree-

ment having been acted on by all parties. There was no discussion of principles or authorities, the court merely saying:

"The court should be very careful in setting aside contracts and agreements which have been acted upon in good faith by others."

§ 149. In Carnegie Trust Co. v. Security L. Ins. Co. (Va. 1910), 68 S. E. 412, a voting trust agreement, under which stock was transferred to trustees for twenty-five years to vote and deal with as if they were owners, the real owners receiving beneficial certificates, was held an active trust, not void per se, and not against public policy in that particular case. After reviewing the authorities at length, Keith, P., in delivering the opinion of the court, said:

"It is impossible to read the argument of counsel and the cases and text-writers cited without perceiving that the force of the attack upon such agreements as that under consideration rests upon the proposition that the trustees are clothed only with the naked or dry trust, wholly separated or 'divorced,' as it is sometimes described, from the beneficial interest in the stock. If the analysis of the elements of property in the ownership of a share of stock given by Cook on Corporations, sixth edition, section 312, be sound—and we think it cannot be controverted—then the right to vote the stock is, in itself and of itself, a valuable right of property, and such a trust becomes, by virtue of that right, an active and not a passive or dry trust. If this view be correct, it of course answers the other branch of the proposition, and there would be no separation—certainly no complete separation—or 'divorce,' such as is contended for, of the ownership of the stock from the beneficial interest in it.

"Passing from definitions as given by writers upon the law of corporations and considering it as a practical subject, does not common experience prove that the power to manage and control property is a valuable right; that the right to manage and control a great corporation to direct its policies, involving in many cases the rightful levy and expenditure of vast sums of money, is in itself and of itself a right of great value? Is it not a matter of common knowledge that the common stock of many corporations which have never paid a dividend has a considerable market value growing out of and dependent upon the right to vote the common stock

which is the power of control? It may be that the expression used by Mr. Justice Holmes, of the supreme court of Massachusetts in Brightman v. Bates, supra, was in the particular case an obiter dictum, but his observation is none the less true that it might with propriety be held 'that the duty of voting incident to the legal title makes such a trust an active one in all cases.'

"Let it be remembered that in this case the trustees were the absolute owners of the stock, and that when they sold the trust certificates they agreed to sell, and the purchasers of those certificates only bought the right to receive payments equal to the dividends upon the shares of stock, less the expense, if any, incurred by the trustees, and on the 1st of February, 1932, to call for certificates for full paid shares of stock at their par value, and that in the meantime the right to vote remained in the trustees, in order to promote and to protect the value of the stock and to secure the satisfactory management of the security company.

"As we have said, there is no case in this state upon the subject; and upon an examination of the authorities elsewhere, we are unable to say that the contract under consideration should be held violative of the public policy of this commonwealth."

§ 150. In Boyer v. Nesbitt (1910), 227 Pa. 398, a voting trust was held valid on the ground that in that case it was coupled with an interest in the trustees who were given a right to purchase stock, and further, that while the general policy of the law prohibits the separation of the voting power from the beneficial interest, it was found as a fact in that case that a property interest and a definite policy of beneficial interest to the corporation was to be carried out by the voting trust.

In Winsor v. Commonwealth Coal Co. (1911), 63 Wash. 62, 114 Pac. 908, an agreement to pool stock for a term of years was held valid on the ground that persons owning stock have the unqualified right to combine their interests to secure the management of the corporation when such management is fair to all stockholders alike.

CHAPTER VII.

DIRECTORS AND OFFICERS.

§ 155. Directors are agents of a corporation appointed by the stockholders; officers are agents of a corporation appointed by the directors.

A corporation being purely a statutory unit person or entity, it can only act by the concerted authority of its membership executed by agents. While in most jurisdictions certain corporate acts are deemed of such fundamental importance as to require the express authorization by the membership or stockholders, as, for example, the increase of the capital stock, it would be cumbersome and impracticable in the large majority of cases to require the membership or stockholders of the corporation to convene for the purpose of considering and passing upon routine acts in the exercise of the corporate powers.

For this reason the exercise by the corporation of its general corporate powers is usually committed by the stockholders, either expressly by virtue of the statute or indirectly by the by-laws, to a managing board commonly called directors or trustees. This managing board represents the body of stockholders in the management of the corporate affairs and the corporate entity itself as agent and agents in dealing with the outside public. Being representatives and agents of the corporation, the directors or trustees do not own the corporate property and are not vested with any legal title to it, and can only deal with it in the corporate name, being in their dealings subject to the usual rules and limitations applicable to agents dealing for principals.

§ 156. As regards the corporations and the stockholders, the directors or trustees are limited to the powers actually conferred upon them expressly or by implication in fact, but their power to bind the corporation in dealing with the public is limited only by their ostensible authority, and that in most

cases is limited only by the charter powers of the corporation. Ostensible authority is that authority held out to the public expressly or by acts and dealings. In the case of corporations, the directors are held out as managers generally, and in the absence of express limitation brought home to parties dealing with the directors, their ostensible powers are coextensive with the powers of the corporation as expressed in the charter and statutes. It is a principle of agency that any act of an agent, though it be unauthorized, yet if it be not unlawful, may be ratified by the principal. The rule applies equally well in the case of directors as of other agents. Acts of directors, though they be ultra vires, i. e., beyond their express powers as directors and therefore unauthorized, yet if they be not ultra vires the corporation, i. e., not beyond the charter powers and therefore not unlawful, may be ratified by the stockholders, and ratification in turn may be express or implied; i. e., by allowing acts to pass without objection until others in reliance thereon have acted or changed their position to their detriment. Acts of directors in the corporate name, within the corporate powers, where expressly authorized or ratified or not objected to seasonably before others have acted in rightful reliance thereon, are binding on the corporation.

§ 157. Officers differ from directors only in these respects, namely, that they are usually appointed by the directors and not by the stockholders, and the scope of their authority is special, not general, as is that of directors. The employment of an officer of a corporation as that of president, treasurer or secretary is a special employment, and the ostensible authority of an officer is not per se coextensive with the corporate powers, as is that of directors, but exceeds express authority conferred only to the extent that the course of dealing, the acts or inaction, the speech or silence of the directors and body of stockholders import approval, and therefore imply authority.

The appointment and authority of other agents are governed by substantially the same rules as those applicable to officers.

§ 158. The directors, officers and other agents of a corporation occupy a fiduciary relation toward the corporation and stockholders and are in duty bound to exercise reasonable capacity, diligence and energy in the management of the corporate affairs bona fide for the benefit of the corporation and the stockholders, and in all their dealings in the name of the corporation and for the corporation they are bound to exercise the utmost good faith and to subordinate their individual interests to those of the corporation and the stockholders. Just as an agent of an individual may not deal in the name of his principal with himself as agent, so the directors of a corporation can only deal in the name of the corporation with themselves as individuals with the assent of the stockholders, and any dealing of the directors of a corporation with the corporation or in its name for the benefit, directly or indirectly, of themselves as individuals, is, until the contrary is shown, presumed to be fraudulent, and while not wholly void per se, is voidable at the election of the stockholders.

§ 159. Directors, officers and agents of a corporation are accountable to the corporation and through it to the stockholders and creditors for their dealings with or in the name of the corporation.

In holding that where the charter of a corporation contemplates transaction of corporate business by a special body or board of directors, any act in the corporate name by any agent or officer authorized by the board of directors and within the charter powers of the corporation is binding on the corporation, Story, J., in Fleckner v. United States Bank, 8 Wheat. 338, said (p. 356):

"The first objection urged against this evidence is, that the corporation could not authorize any act to be done by an agent, by a mere vote of the directors, but only by an appointment under its corporate seal. And the ancient doctrine of the common law that a corporation can only act through the instrumentality of its common seal has been relied upon for this purpose. Whatever may be the original correctness of this doctrine, as applied to corporations existing by the common law, in respect even to which it has been certainly broken in upon in modern times, it has no application to corporations

created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a special body or board of directors. And the acts of such body or board, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal. In respect to banks, from the very nature of their operations, in discounting notes, in receiving deposits, in paying checks, and other ordinary and daily contracts, it would be impracticable to affix the corporate seal as a confirmation of each individual act. And if a general authority for such purposes, under the corporate seal, would be binding upon the corporation, because it is the mode prescribed by the common law, must not the like authority, exercised by agents appointed in the mode prescribed by the charter, and to whom it is exclusively given by the charter, be of as high and solemn a nature to bind the corporation? To suppose otherwise is to suppose that the common law is superior to the legislative authority; and that the legislature cannot dispense with forms or confer authorities which the common law attaches to general corporations. Where corporations have no specific mode of acting prescribed, the common-law mode of acting may be properly inferred; but every corporation created by statute may act as the statute prescribes, and the common law cannot control by implication that which the legislature has expressly sanctioned. Indeed, this very point has been repeatedly under the consideration of this court; and in the case of Bank of Columbia v. Patterson (7 Cranch, 299) and Mechanics' Bank of Alexandria v. Bank of Columbia (5 Wheat. 326), principles were established which settle the point that the corporation may be bound by contracts not authorized or executed under its corporate seal and by contracts made in the ordinary discharge of the official duty of its agents and officers. We have no doubt, therefore, upon the principles of the common law, that a vote of the board of directors of the Planters' Bank was as full authority for any act of this nature to bind the corporation as if it had passed under the common seal."

§ 160. In holding the question whether a cashier had acted within his ostensible authority to be for the jury to determine, Swayne, J., in Merchants' Bank v. State Bank, 10 Wall. 604, said (p. 644):

"It should have been left to the jury to determine whether from the evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the

usage of other banks in the same city, it might not fairly be inferred that Smith had authority to bind the defendant by the contract which he made with the Merchants' Bank.

"Where a party deals with a corporation in good faith—the transaction is not ultra vires—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. . . . .

"Corporations are liable for the acts of their servants while engaged in the business of their employment in the same manner and to the same extent that individuals are liable under like circumstances."

§ 161. In holding that an obligation incurred in the name of a company by its de facto officers was binding on the company, Harlan, J., in Mining Co. v. Anglo-Californian Bank, 104 U. S. 192, said (p. 194):

"Upon the board of directors of the mining company was imposed, by the laws of California (Civil Code, sec. 305), the duty of exerting its corporate powers, and of conducting and controlling its business and property. Among the powers which the company had (Civil Code, sec. 354) was the power 'to enter into any obligations or contracts essential to the transaction of its ordinary affairs or for the purposes for which it was created.' Necessarily, therefore, the board had authority not only to designate the banking institution in which the money of the company should be deposited, but to prescribe the mode in which and the officers by whom it should be withdrawn, from time to time, for use of the company. It is equally clear that the board had, as incident to the general powers conferred by law upon the company, power to borrow money for the purposes of the corporation, and to invest certain officers with authority to negotiate loans, to execute notes, and to sign checks drawn against its bank account, and it is settled law that the existence of such authority in a subordinate officer may, in the absence of express statutory prohibition, be shown otherwise than by the official record of the proceedings of the board. It may be established by proof of the course of business between the parties themselves; by the usages and practice which the company may have permitted to grow up in its business; and by the knowledge which the board charged with the duty of controlling and conducting the transactions and property of the corporation had, or must be

presumed to have had, of the acts and doings of its subordinates in and about the affairs of the corporation."

§ 162. In holding notes ultra vires, made pursuant to an ultra vires contract, not enforceable, Campbell, J., in Pearce v. R. R. Cos., 21 How. 441, said (p. 443):

"Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority."

In holding that a county having authority to issue bonds had ratified an issue irregularly made, Clifford, J., in Supervisors v. Schenck, 5 Wall. 772, said (p. 781):

"Questions of ratification most frequently arise in respect to the acts or omissions of agents, but the general rule is the same in all cases where the act done was one which it was competent for the party attempted to be charged to do. When the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings or omissions of his agent, he will be bound thereby as fully, to all intents and purposes, as if he had originally given him direct authority in the premises to the extent which such acts, doings or omissions reach.

"Ratification is inoperative if the party attempted to be charged was not competent to make the contract in question when the same was made nor when the supposed acts of ratification were performed, or if the contract was illegal, immoral or against public policy. Like an individual, a corporation may ratify the acts of its agents done in excess of authority, and such ratification may, in many cases, be inferred from acquiescence in those acts, as well as from express adoption. Such ratification may be by express consent, or by acts and conduct of the principal inconsistent with any other hypothesis than that he approved and intended to adopt what had been done in his name; and it was held in Peterson v. The Mayor of New York, 17 N. Y. 453, that the principle is as applicable to corporations as to individuals. Where the officers of the corporation openly exercise powers affecting the interests of third persons, which presupposes a delegated authority for the purpose, and other corporate acts subsequently performed show that the corporation must have contemplated the legal exist-

ence of such authority, the acts of such officers will be deemed rightful and the delegated authority will be presumed." (Bank v. Dandridge, 12 Wheat. 70.)

In holding that a transaction ultra vires the charter powers of a corporation could not be ratified, White, J., in California Bank v. Kennedy, 167 U. S. 362, p. 371, said:

"It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void could not be confirmed or ratified. As was said by this court in Union Pacific Ry. v. Chicago etc. Ry., 163 U. S. 564, speaking through Mr. Chief Justice Fuller (p. 581): 'A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel.' "

§ 163. In holding that directors must account to stock and bond holders for all money and property received from a collusive and fraudulent sale of the property of the corporation, Strong, J., in Jackson v. Ludeling, 21 Wall. 616, said (p. 631):

"That the property was sacrificed by means of an unlawful and widespread combination is abundantly proved, and that the directors who were parties to it, and who became the purchasers, were guilty of an inexcusable violation of confidence reposed in them admits of no doubt. . . . . The defendants can take nothing from such a sale thus made. Were we to sustain it we should sanction a great moral and legal wrong, give encouragement to faithlessness to trusts and confidence reposed, and countenance combinations to wrest by the forms of law from the uninformed and confiding their just rights."

§ 164. Where a director loaned money to the corporation secured by a deed of trust on the corporate property and afterward purchased the property individually under the power of sale in the deed, Miller, J., in holding that the transaction, if voidable, had not been rescinded within a reasonable time in Twin Lick Oil Co. v. Marbury, 91 U. S. 587, said (p. 588):

"That a director of a joint stock corporation occupies one of those fiduciary relations where his dealings with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with

jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others. Koehler v. Black River Falls Iron Co., 2 Black, 715; Drury v. Cross, 7 Wall. 299; Luxemburg R. R. Co. v. Maquay, 25 Beav. 586; The Cumberland Co. v. Sherman, 30 Barb. 553; 16 Md. 456. The general doctrine, however, in regard to contracts of this class is, not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. We say this is the general rule; for there may be cases where such contracts would be void ab initio; as when an agent to sell buys of himself and by his power of attorney conveys to himself that which he was authorized to sell. But, even here, acts which amount to a ratification by the principal may validate the sale.

"The present case is not one of that class. While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed and the transaction is open and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid and of the extent to which it may safely be given.

"There are in such a transaction three distinct parties whose interest is affected by it; namely, the lender, the corporation and the stockholders of the corporation.

"The directors are the officers or agents of the corporation, and represent the interests of that abstract legal entity and of those who own the shares of its stock. One of the objects of creating a corporation by law is to enable it to make contracts; and these contracts may be made with its stockholders as well as with others. In some classes of corporations, as in mutual insurance companies, the main object of the act of incorporation is to enable the company to make contracts with its stockholders, or with persons who become stockholders by the very act of making the contract of insurance. It is very true that as a stockholder, in making a contract of any kind with the corporation of which he is a member, is in some sense dealing with a creature of which he is a part and holds a common interest with the other stockholders, who with him consti-

tute the whole of that artificial entity, he is properly held to a larger amount of candor and good faith than if he were not a stockholder. So when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent. If he should be a sole director or one of a smaller number vested with certain powers, this obligation would be still stronger and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality and freedom from motives of selfishness. . . . . The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party with whom that right is optional is aware of the facts which give him that option, are numerous and well collected in the brief of appellee's counsel. The more important are as follows: Badger v. Badger, 2 Wall. 87; Harwood v. R. R. Co., 17 Id. 78; Marsh v. Whitman, 21 Id. 178; Vigers v. Pike, 8 Cl. & Fin. 650; Wentworth v. Lloyd, 32 Beav. 467; Follansbee v. Kilbreth, 17 Ill. 522."

LIABILITY, AS INDIVIDUALS, OF DIRECTORS AND OFFICERS OF CORPORATIONS FOR ACTS OR FAILURE TO ACT WHILE ENGAGED IN SUCH CAPACITY.

§ 165. Officers and directors of corporations are not, generally speaking, liable for corporate acts, but they are liable for their own acts or failure to act to the extent that an agent is ordinarily liable for acts or failure to act when about the business of his principal. In the case of torts, the liability of the officer or director is determined by the extent of his participation therein; in the case of contracts, by the extent of individual liability assumed, ascertained from a proper construction of the facts proving the contract, oral or written.

In Arthur v. Griswold, 55 N. Y. 400, it was held that directors of a corporation were not liable for damages suffered through the false representations of an agent of the

corporation upon which the plaintiff had been induced to make loans to the corporation. Church, C. J., said:

"To maintain an action for obtaining money or property by fraudulent representations, it must be shown that the person charged made the representations, that they were false to his knowledge, and that the representations were relied upon, and were the inducing cause for parting with the property. There is a significant weakness in the plaintiff's case to establish the first branch of the rule of liability against the defendant Corning. He had no interest in the property transferred to the company and did not participate in its organization. It does not appear that he ever attended a meeting of the directors, or that he was ever in Essex county, where the property is located, or in the office in New York, where the financial business was transacted, and, as to the prospectus, which contains the principal alleged false representations, it does not appear that he ever saw it or knew of its existence. The only evidence against him was that he was named as a director, and one hundred shares of stock were issued in his name on the books of the company, the certificates of which were mailed to him. But for the inference which may result from the admission in his answer that he was a director, there would be no evidence that he knew that he occupied that position. We think the evidence was insufficient to maintain a charge of fraud.

"The mere fact of being a director and stockholder is not per se sufficient to hold a party liable for the frauds and misrepresentations of the active managers of a corporation. Some knowledge of and participation in the act claimed to be fraudulent must be brought home to the person charged. (51 N. Y. 27.) The pamphlet or prospectus was, in fact, printed before the organization of the company, and was mainly prepared by one Remington, who was the active promoter and manager of the company; but that Mr. Corning had any connection with it or knowledge of its existence is not shown."

Similarly, Wakeman v. Dalley, 51 N. Y. 27.

§ 166. Where, however, a person participates in a positive tortious act, he is liable, though he acted in the capacity of an officer or director of a corporation.

In National Car Brake Shoe Co. v. Terre Haute Car & Mfg. Co., 19 Fed. 514, in holding officers of a company as well as the corporation liable in an action on the case for infringement of a patent, Woods, J., said:

"The action is in the form of a suit in trespass on the case, and consequently, if all the defendants have participated in the infringement, they are all liable, though the individuals were acting simply as officers of the company in doing it. All parties who take part in a tort or trespass are liable. A man cannot retreat behind a corporation and escape liability for a tort in which he actively participates." (Hempfling v. Burr, 59 Mich. 294; United Society of Shakers v. Underwood, 72 Ky. 609; Peck v. Cooper, 112 Ill. 192; Nunnelly v. Southern Iron Co., 94 Tenn. 397; Chenango Bridge Co. v. Paige, 83 N. Y. 178; Cahoone Barnet Mfg. Co. v. Rubber & Celluloid Harness Co., 45 Fed. 582; Edison Electric Light Co. v. Packard Electric Co., 61 Fed. 1002; Belo v. Fuller, 84 Tex. 450; Bates v. Van Pelt, 1 Tex. Civ. App. 185. Contra, Bath v. Caton, 37 Mich. 199; United Nickel Co. v. Worthington, 13 Fed. 392; Hewitt v. Swift, 3 Allen, 420.)

§ 167. In cases where damage has been caused by negligence, if an officer, director or other agent of a corporation is placed in a position raising a duty on his part to exercise care, he is liable for damages, caused to persons without blame themselves, by his failure to use reasonable care under the circumstances.

A distinction is made in many cases between nonfeasance and misfeasance, but this is not very intelligible, for there can be no actual case of nonfeasance unless where a person has done nothing whatever, however remote, in connection with the matter involved, and so this distinction really reduces itself to saying that there is no liability for negligent conduct unless it be the proximate cause of damage suffered.

In Mayer v. Thompson-Hutchinson Bldg. Co. (Ala.), 16 South. 620, in holding that the president and manager of the corporation were liable equally with the company for damages resulting from negligent failure to erect proper scaffolding in building construction, to prevent falling of bricks upon persons, Coleman, J., said:

"The second count charges the defendants with neglect, in their failure or omission to erect scaffold or guards so as to prevent brick from falling to the ground. On this proposition the defendant Thompson invokes the doctrine that an agent or servant is not liable for a mere omission or nonfeasance. The rule is stated as contended for in Story Ag.,

§ 308, and in Story Cont., § 171, and there are numerous decisions which fully sustain the text. There are courts of high authority which hold differently. Our attention has not been called to any decision of the question in this state, and in declaring the law which shall govern we have carefully considered both lines of decisions. The principle upon which the rule is founded as declared by Story is that there is no privity between the servant or agent and third persons, but the privity exists only between him and the master or principal. This relation of privity is that from which arises the maxim 'respondeat superior.' The liability of the principal or master to third persons does not depend upon any privity between him and such third persons. It is the privity between the master and servant that creates the liability of the master for injuries sustained by third persons on account of misfeasance and nonfeasance of the servant or agent. It is difficult to apply the same principles which govern in matters of contract between an agent and third persons to the torts of an agent which inflict injury on third persons, whether they be of misfeasance or nonfeasance, or to give a sound reason why a person who, acting as principal, would be individually liable to third persons for an omission of duty, becomes exempt from liability for the same omission of duty because he was acting as servant or agent. The tort is none the less a tort to the third person, whether suffered from one acting as principal or agent, and his rights ought to be the same against the one whose neglect of duty has caused the injury. We think the better rule declared in Baird v. Shipman, 22 Am. St. Rep. 504, 132 Ill. 16, 23 N. E. 384, in which it is held that 'an agent of the owner of property, who has the complete control and management of the premises, and who is bound to keep them in repairs, is liable to third persons for injuries resulting to the latter while using the premises in an ordinary and appropriate manner, through the neglect of such agent. And the agent cannot excuse himself on the plea that his principal is liable. It is not his contract that exposes him to liability to third persons, but his common-law obligation to so use that which he controls as not to injure another.' See notes to this case in 22 Am. St. Rep. 504. In Ellis v. McNaughton, 76 Mich. 237, 42 N. W. 1113, we find this language: 'Misfeasance may involve the omission to do something which ought to be done, as when an agent engaged in the performance of his undertaking omits to do something which it is his duty to do under the circumstances; as that when he does not exercise that degree of care which due regard for the rights of others requires.' In Campbell v.

Sugar Co., 62 Me. 552, it is said: 'It is the actual personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation; and when their acts or neglects result in injury to third persons, they are equally responsible with their principal.' The rule is broadly stated in 14 Am. & Eng. Ency. Law, 814. We might cite other decisions if deemed necessary. We hold that the mere relation of agency does not exempt a person from liability for any injury to third persons, resulting from his neglect of duty, for which he would otherwise be liable."

§ 168. In Nunnelly v. Southern Iron Co., 94 Tenn. 397, in holding officers of the corporation liable, as well as the company, for allowing muddy water to be discharged into a stream running through plaintiff's premises, Hatcher, special justice, said:

"When a person enters into a contract with a corporation, through its agents or officers, fairly and in good faith, there can, under no circumstances, any liability attach to such agents or officers in respect to the contract, unless so stipulated. In such a case the person gets just what he bargained for, a liability against or a contract with a corporation alone. But the torts or wrongs of corporations through its agents or officers are governed by an entirely different principle of law. If the agent of a corporation or of an individual commits a tort, the agent is clearly liable for the same; and it matters not what liability may attach to the principal for the tort, the agent must respond in damages, if called upon to do so."

Similarly, Greenberg v. Whitcomb Lumber Co. (Wis.), 63 N. W. 93; Jeune v. Sutton, 43 N. J. L. 257.

§ 169. In the case of contracts, the question of the liability, individually, of officers or directors making the contract is a question of construction to determine the intention expressed, orally or in writing, as the case may be. The question often arises in connection with negotiable instruments signed by individuals, with the words "president" or "secretary" added, still leaving it doubtful on the instrument whether the note or other obligation is that of the corporation or of the individuals, or both. The mere addition of such words,

however, is not sufficient to make the obligation other than that of the parties signing, and to create a corporate obligation there must be expressed intention so to do. (Draper v. Mass. S. H. Co., 5 Allen, 338; McCandless v. Belle Plane Co., 78 Iowa, 161; Guthrie v. Imbrie, 12 Or. 182; note, 19 L. R. A. 676.)

CHAPTER VIII.

CONSOLIDATION AND MERGER.

§ 175. There are two distinct ways of uniting two or more existing corporations into one corporation; one is by forming a new corporation which takes over all or part of the property, franchises, rights and liabilities of two or more pre-existing corporations, whose existence becomes thereupon terminated; the other occurs where of two or more existing corporations one continues in existence under the same or a different corporate name and takes over the property, franchises, rights and liabilities of the other one or more corporations whose existence becomes thereupon terminated. The former method of uniting corporations is usually termed a consolidation; the latter is termed a merger. While the name by which it is called matters little, it is often important before the event to determine which method should be adopted and after a union has been effected what method was followed, since upon it turns the question whether a right or privilege conferred by statute upon a new corporation has been or should be acquired, or whether a privilege or exemption conferred by the statute in the past on the pre-existing corporation is worth preserving or has been lost. Neither consolidation nor merger can be effected except under and by virtue of statutory authority, and therefore the question whether a consolidation or merger takes place and what property rights and liabilities are acquired or lost is to be determined by the terms of the statute under which the merger or consolidation takes place and the terms of the agreement and certificate of the consolidation or merger.

§ 176. It is laid down as a rule that until the contrary appears from the statute or agreement and certificate of consolidation or merger, the presumption is that all the rights and liabilities of each of the old companies are acquired and assumed by the new company, and the question whether the new

company is a newly created corporation or one of the pre-existing corporations continued in existence resolves itself into the question whether the language of the authorizing statute contains words creative of a new corporation or merely words continuing the existence of a pre-existing corporation.

§ 177. In holding that a consolidated company under the act providing for the consolidation was a new company and not entitled to a certain exemption from taxation contained in the original charters of the constituent companies, Field, J., in Railroad Co. v. Maine, 96 U. S. 499, p. 509, said:

"The provision in the act authorizing consolidation that the new company should have all the powers, privileges and immunities of the original companies must therefore be taken with the qualification that it should have them so far as they could be exercised or enjoyed by it with its different officers and distinct constitution. Where their exercise or enjoyment required other officers or a different constitution, the grant was to that extent necessarily inoperative.

"The Maine Central Railroad Company was, upon the consolidation of the original companies, a new corporation, as distinct from them as though it had been created before their existence. The fact that the powers, privileges and immunities which they had possessed were conferred upon the new company, so far as they could be exercised or enjoyed by it, in no respect affected its character as a distinct body. A new corporation may be as readily created by the union of two or more corporations as by the union of individuals; and its powers and privileges may as well be designated by reference to the charters of other companies as by special enumeration."

§ 178. In holding that the question whether in case of consolidation of two or more companies a new company is created or the pre-existing companies continue merged in one is one of the proper construction to be placed on the statute authorizing the consolidation, and in that case before the court there was no new company but a merger, Strong, J., in Central R. R. Co. v. Georgia, 92 U. S. 665, said (p. 670):

"It may be that the consolidation of two corporations or amalgamation, as it is called in England, if full and complete, may work a dissolution of them both, and its effect may be the creation of a new corporation. Whether such be the effect

or not must depend upon the statute under which the consolidation takes place and of the intention therein manifested. If in the statute there be no words of grant of corporate powers, it is difficult to see how a new corporation is created. If it is, it must be by implication, and it is an unbending rule that a grant of corporate existence is never implied. . . . . If, then, this construction of the act of August 24, 1872, be correct (and we cannot doubt that it is), that act contemplated and authorized no such union and consolidation of the two companies as should work a surrender of their charter by both of them and the creation of a new company. At most it intended a merger of the Macon & Western Railroad Company into the other, a mode of transfer of that company's franchise and property and a payment therefor with stock of the Central Company. It is of no importance to the inquiry whether a new corporation was created by the union and consolidation, that the Central acquired under the act new and enlarged powers as well as new stockholders. It was authorized to own and operate a railroad from Macon to Atlanta; to operate it as its own. It was also authorized to increase its capital stock. But the gift of new powers to a corporation has never been thought to destroy its identity, much less to change it into a new being. Such a gift is not a grant of corporate existence. It assumes corporate life already existing. Nor is it a necessary inference from the provision of the act of August 25, 1872, requiring the board of directors of each company to certify the union and consolidation to the governor of the state, that the union was intended to be a surrender of the charter of both companies and the acceptance of a new charter. There were sufficient reasons for that requirement without the large inference attempted to be drawn from it. They were that it might appear in the office of the Secretary of State that the Macon and Western Railroad Company was no longer in existence, and that the capital stock of the Central Company had been increased.

"Our opinion therefore is, that the charter granted to the Central Railroad and Banking Company of Georgia by the act of 1835 was not surrendered by its action under the later act of 1872; that it still has all the rights that were originally conferred upon it holding them under the charter originally granted to it; and consequently that it is not in the power of the legislature to impose upon it a greater tax than one-half of one per centum of its net annual income."

§ 179. In holding that a corporation into which had been merged certain railroad companies was entitled to the exemp-

tion of its stock from taxation enjoyed by one of the constituent companies, Waite, C. J., in Tennessee v. Whitworth, 117 U. S. 139, p. 147, said:

"When two railroad companies unite or become consolidated under the authority of law, the presumption is, until the contrary appears, that the united or consolidated company has all the powers and privileges, and is subject to all the restrictions and liabilities, of those out of which it was created. Tomlinson v. Branch, 15 Wall. 460; Branch v. Charleston, 92 U. S. 677, 682; County of Scotland v. Thomas, 94 U. S. 682, 690; Railroad Co. v. Maine, 96 U. S. 499, 512; Green County v. Conness, 109 U. S. 104. From this it follows that as the capital stock of both the original Tennessee corporations was exempt from taxation, the capital stock of the united or consolidated company formed by the simple aggregation of that of the two old ones is also exempt unless it has been provided to the contrary. Is there anything in the statute authorizing the union which rebuts this presumption? We think there is not."

HOLDING STOCK OF ITSELF OR OF OTHER COMPANIES BY CORPORATION.

§ 180. Since a corporation has only such powers as are conferred upon it, expressly or impliedly, by its charter, it follows that a corporation cannot acquire nor hold its own stock ordinarily, nor that of other companies, unless authorized so to do by statute.

In De La Vergne Co. v. German Savings Inst., 175 U. S. 40, in holding that a contract for the purchase by one corporation of the stock of another for the purpose of controlling its management, not being expressly authorized by statute, was ultra vires, and therefore unenforceable, Brown, J., said (pp. 54–58):

"But as the powers of corporations, created by legislative act, are limited to such as the act expressly confers, and the enumeration of these implies the exclusion of all others, it follows that, unless express permission be given to do so, it is not within the general powers of a corporation to purchase the stock of other corporations for the purpose of controlling their management. First National Bank v. National Exchange Bank, 92 U. S. 122, 128; Sumner v. Marcy, 3 Wood &

Minot, 105; Morawetz on Corp., sec. 431; 1 Thompson on Corp., sec. 1102; People v. Chicago Gas Trust Co., 130 Illinois, 268; Milbank v. New York, Lake Erie & Western Railroad, 64 How. Pr. 20; Mechanics' etc. Bank v. Meriden Co., 24 Connecticut, 159. . . . .

"Our conclusion upon this branch of the case is that, as the main, if not the sole, object of the purchase from the plaintiffs was to acquire their stock in the Consolidated Company, such purchase was ultra vires the Refrigerating Company.

"2. Is this defense available to the Refrigerating Company? Whatever doubts might have been once entertained as to the power of corporations to set up the defense of ultra vires to defeat a recovery upon an executed contract, the rule is now well settled, at least in this court, that where the action is brought upon the illegal contract, it is a good defense that the corporation was prohibited by statute from entering into such contract, although in an action upon a quantum meruit it may be compelled to respond for the benefit actually received.

"The earliest case in which this doctrine is distinctly laid down is that of Pearce v. Madison & Indianapolis Railroad, 21 How. 441, in which it appears that two railroad companies, which had been consolidated, gave their promissory notes in payment for a steamboat to run in connection with the railroads. It was held that, as there was no authority in the railroad companies to engage in running steamboats, there could be no recovery on the notes, and that as the plaintiff was not the owner of the boat and had sued upon the notes as an indorsee, there could be no recovery. The same doctrine has been applied to leases ultra vires a corporation, and it has been uniformly held that there could be no recovery upon the lease itself, though there might be in an action for use and occupation of the property. Pittsburgh, Cincinnati etc. Railway v. Keokuk & Hamilton Bridge Co., 131 U. S. 371, 384; Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 48; S. C., 171 U. S. 138; McCormick v. Market Bank, 165 U. S. 538, 550; Thomas v. Railroad Co., 101 U. S. 71; California Bank v. Kennedy, 167 U. S. 362; Marble Co. v. Harvey, 92 Tennessee, 116; Union Pacific Railway v. Chicago, Rock Island and Pacific Railway Co., 163 U. S. 564.

"The doctrine that no recovery can be had upon the contract is based upon the theory that it is for the interest of the public that corporations should not transcend the limits of their charters; that the property of stockholders should not be put to the risk of engagements which they did not undertake; that if the contract be prohibited by statute, everyone dealing with the corporation is bound to take notice of the

restrictions in its charter, whether such charter be a private act or a general law under which corporations of this class are organized. Zabriskie v. Cleveland etc. Railroad, 23 How. 381, 398; Thomas v. Railroad Co., 101 U. S. 71; Pennsylvania Co. v. St. Louis, Alton & Terre Haute Railroad, 118 U. S. 290, 630; Oregon Railway Co. v. Oregonian Railway Co., 130 U. S. 1, 25; Railway Companies v. Keokuk Bridge Co., 131 U. S. 371, 384.

"As the action in this case is upon the contract, and as the contract was prohibited by the charter of the Refrigerating Company, there can be no recovery upon it." (Valley R. Co. v. Lake Erie Iron Co., 46 Ohio St. 44; Holmes & G. Mfg. Co. v. Holmes Metal Co., 127 N. Y. 252; Mechanics & W. Mut. Sav. & Building Assn. v. Meriden Agency Co., 24 Conn. 159; Talmage v. Pell, 7 N. Y. 328; Franklin Co. v. Lewiston Sav. Inst., 68 Me. 43; First Nat. Bank of Charlotte v. National Exch. Bank, 92 U. S. 122; People v. Chicago Gas Trust Co., 130 Ill. 268.)

§ 181. But though a corporation has no power to acquire and hold stock in another corporation, such power is implied as of necessity in cases where it be necessary in order to obtain payment of debt, the stock being taken not to be held, but to be disposed of and realized in cash. (First Nat. Bank v. National Bank, 92 U. S. 128; Howe v. Boston Carpet Co., 16 Gray, 495; Hodges v. New England Screw Co., 1 R. I. 312; Taylor County Ct. v. Baltimore & O. R. Co., 35 Fed. 161.)

In First Nat. Bank v. Nat. Exch. Bank, 92 U. S. 122, in holding that a corporation not authorized to purchase and hold stock in other companies might accept stock in satisfaction of a doubtful debt with a view to its reduction into money to prevent anticipated loss, Waite, C. J., said (p. 128):

"Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in Fleckner v. Bank U. S., 8 Wheat. 351, where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary

business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions. For this reason, among others, the acceptance of an indorsed note in payment of a debt due was decided not to be a 'dealing' in notes. Of course, all such transactions must be compromises in good faith, and not mere cloaks or devices to cover unauthorized practices."

§ 182. A corporation may not acquire its own stock ordinarily unless authorized by statute, for a purchase of its own stock is tantamount to a decrease of its capital. (Johnston v. Allis, 71 Conn. 207; Holladay v. Elliott, 8 Or. 84; Oliver v. Rahway Ice Co., 64 N. J. Eq. 596.) If authorized, however, the corporation, acting in good faith, may buy and sell its own shares of stock. (Republic L. Ins. Co. v. Swigert, 135 Ill. 150; First Nat. Bank of Salem v. Salem Capital Flour-mills, 39 Fed. 89; Blalock v. Kernersville Mfg. Co., 110 N. C. 99; Iowa Lumber Co. v. Foster, 49 Iowa, 25; Oliver v. Rahway Ice Co., 64 N. J. Eq. 596.) So a corporation may acquire its own stock where necessary in order to obtain payment of a debt. (Columbus City Bank v. Bruce, 17 N. Y. 507; Taylor v. Miami Exporting Co., 6 Ohio, 176; Union Nat. Bank v. Hunt, 7 Mo. App. 42.) But a corporation cannot acquire its own stock to the prejudice of its creditors. (Heggie v. People's Bldg. & Loan Assn., 107 N. C. 581; St. Louis Carriage Mfg. Co. v. Hilbert, 24 Mo. App. 338, and authorities supra. For further authorities, see Thompson, 2d ed., §§ 650–654; 18 L. R. A. 252, note; 61 L. R. A. 621; note.)

CHAPTER IX.

RECEIVERS.

§ 185. A receiver is an officer of the court, and is appointed by the court in a pending suit or proceeding to take custody, possession, or title, as the case may be, to certain property which is of the subject matter of the pending litigation, for the safe-keeping, preservation and, where necessary, realization of the property in money, and for the benefit of those persons, parties to the litigation or others, who may be determined in the litigation to be entitled to it.

It is to be borne in mind that a receiver is merely the agent or arm of the court, and that property in the hands of a receiver is in the possession of the court, in custodia legis. A receivership is not an end in itself, is not final relief in itself, but is incidental merely to some equitable relief prayed, and is in fact a means to an end, an instrumentality adopted by the court to conserve property in order that relief prayed for in a pending suit may be effectual when decreed, and may not be rendered futile by the waste, destruction or misappropriation of the subject-matter property during the time required for the determination of the subject of the suit.

§ 186. The rights, duties and powers of a receiver are limited by the terms of the order appointing the receiver which in turn is limited in its extent and scope by the jurisdiction of the court over the parties, over the subject matter of the suit and over the subject-matter property usually governed by the statute authorizing the appointment of the receiver. From this it is not to be inferred that the jurisdiction to appoint a receiver is always statutory. On the contrary, wherever the jurisdiction of a court of equity extends to the determination of rights to specific property, it will, in a proper case, appoint a receiver to conserve the property pending the determination of its final disposition. In the

absence of statutory provision, however, a receiver is a custodian merely, and takes neither title nor right of possession, except the relative right of the parties to the suit. Since, therefore, a receiver is the custodian of the court, limited in his powers and functions by the jurisdiction of the court in its territorial extent as well as otherwise, a receiver of a corporation has a right to the custody of only such property of the corporation as is within the territorial jurisdiction of the court, except in cases where, by virtue of a statute or otherwise, the court gets such jurisdiction of the corporate entity itself that it can and does clothe the receiver either with title or right to possession generally as distinct from mere custody of the property of the corporation wherever located. In cases where suits are pending in different courts, the custody of one receiver once obtained will not be ousted nor interfered with except through an application made and passed upon by the court appointing the receiver whose right of custody is in question; this rule is based on the comity of procedure and respect of one judicial tribunal for another and on the necessity of a dignified and decorous administration of justice. Whether a receiver will be appointed in a particular case will depend on two considerations—(1) whether the court in which the application is made has jurisdiction; (2) whether the appointment of a receiver is necessary to conserve the property in question.

§ 187. Since a receivership is not competent relief in itself, the jurisdiction of the court depends on whether a suit is pending or may be instituted for some relief like an accounting or reduction of assets in a judgment creditor's suit or other relief recognized as proper; then the party or parties plaintiff must be shown to have a standing in court to ask for the relief prayed, and jurisdiction over the defendant corporation or its property must be had in fact or at least obtainable. For example, whatever might be the merits, a simple contract creditor would have no standing to institute or maintain a pending suit for the appointment of a receiver

and the application of assets of an insolvent corporation, since he must first reduce his claim to judgment in order to be in a position to ask the equitable relief recognized as competent in a judgment creditor's bill. Again, the court would not have jurisdiction and would not appoint a receiver of a foreign corporation not doing business in the state, not having submitted itself to the jurisdiction and not having property within the territorial jurisdiction of the court. On the other hand, in a suit by a judgment creditor pending or about to be instituted against an insolvent domestic corporation to compel payment of unpaid subscriptions by stockholders, the court would have jurisdiction and in a proper case will appoint a receiver.

§ 188. Whether the appointment of a receiver is proper depends on all the circumstances as to the necessity for such interference by the court with the possession of the corporation or other party. Mere insolvency of a corporation without more is not sufficient, though usually where a corporation is insolvent sufficient will exist to constitute a proper case and warrant the interference by the court.

The appointment of a receiver by a court having jurisdiction of the parties and the subject matter is discretionary with the court, but since by such appointment the court interferes with the possession of its property by a corporation or other party, a case must be made out showing the necessity therefor and that on all the facts and circumstances a receiver is in fact necessary to conserve the property for all the parties in interest. In such case the court will appoint a receiver, with right of possession or custody dating from the appointment, either temporarily or permanent, as the case may require, to conserve, safeguard and realize the property of the corporation party defendant, of course subject to the further orders of the court.

§ 189. In holding that a statutory receiver of a corporation takes the title given by the statute to all the corporate property wherever situated, Waite, J., in Relfe v. Rundle, 103 U. S. 222 (p. 225), said:

"We are aware that except by virtue of some statutory authority, an administrator appointed in one state cannot generally sue in another, and that a receiver appointed by a state court has no extraterritorial power; but a corporation is the creature of legislation and may be endowed with such powers as its creator sees fit to give. Necessarily it must act through agents, and the state which creates it may say who those agents shall be. One may be its representative when in active operation and in full possession of its powers, and another if it has forfeited its charter and has no lawful existence except to wind up its affairs. No state need allow the corporations of other states to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does without limitation, express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of it existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

§ 190. Where the court had placed a railroad in the hands of its receiver and operated it at the suit of an unsecured judgment creditor, Harlan, J., holding that such creditor was entitled to have his debt satisfied out of earnings in the hands of the receiver as against a trustee under a mortgage in Sage v. Memphis etc. R. R. Co., 125 U. S. 361, said (p. 376):

"In the present case it is true Sage did not sue out execution upon his judgment and have a return of nulla bona. But that point has become immaterial. The railroad company made no such objection at the time the receiver was appointed. Besides, suing out an execution would, according to the facts and the admission of the parties, have been an idle ceremony, causing useless expense, and bringing no real benefit to the plaintiff. It is true, also, that Sage did not sue in behalf of all the creditors of the company or of such as might come in and contribute to the expense of the litigation. He was not bound to pursue that course. It was his privilege under the law to sue for his own benefit, and it was within the power of the court for his protection as a judgment creditor to place the property of the debtor company in the hands of a receiver for administration under

its orders. We do not mean to say that a single judgment creditor or any number of such creditors of a railroad company are entitled, as a matter of right, to have its property put in the hands of a receiver merely because of its failure or refusal to pay its debts. Whether a receiver shall be appointed is always a matter of discretion to be exercised sparingly and with great caution in the case of quasi-public corporations operating a public highway, and always with reference to the special circumstances of each case as it arises. All that we say in this connection is that under the circumstances presented in this case the appointment of the receiver was within the power of the court."

§ 191. In holding that a simple contract creditor could not maintain a suit in equity against an insolvent corporation for the appointment of a receiver and distribution of assets of the corporation, Brewer, J., in Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, said (p. 378):

"The plaintiffs were simple contract creditors of the company; their claims had not been reduced to judgment, and they had no express lien by mortgage, trust deed or otherwise. It is the settled law of this court that such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor and its application to the satisfaction of their claims; and this, notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarcation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation. Scott v. Neely, 140 U. S. 106; Cates v. Allen, 149 U. S. 451. Nor is it otherwise in case the debtor is a corporation and an unpaid stock subscription is sought to be reached. National Tube Works Co. v. Ballou, 146 U. S. 517; Swan Land & Cattle Co. v. Frank, 148 U. S. 603. . . . . But it is earnestly insisted that it has been held by this court in Case v. Beauregard, 101 U. S. 688, that whenever a creditor has a trust in his favor, or a lien upon property for a debt due him, he may go into equity without exhausting his legal remedies; that it has also frequently been affirmed that the capital stock and assets of a corporation constitute a trust fund for the benefit of its creditors which neither the officers nor stockholders can divert or waste, and several cases are cited, among them that of Sanger v. Upton, 91 U. S. 56, in which perhaps the proposition is asserted in the most direct and emphatic language, and Terry v. Anderson, 95 U. S. 628, 636, in which Chief

Justice Waite made these observations: 'Ordinarily, a creditor must put his demand into judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions; and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation. If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund which will be administered by a court of equity in the absence of a trustee; the principle being that equity will not permit a trust to fail for want of a trustee.'

"While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 Pomeroy's Equity Jurisprudence, section 1046, they 'are not in any true and complete sense trusts, and can only be called so by way of analogy or metaphor.' To the same effect are decisions of this court. The case of Graham v. Railroad Co., 102 U. S. 148, was an action by a subsequent creditor to subject certain property alleged to have been wrongfully conveyed by the corporation debtor to the satisfaction of his judgment. And the very proposition here presented was then considered, and in respect to it the court, by Mr. Justice Bradley, said (p. 160): 'It is contended, however, by the appellant that a corporation debtor does not stand on the same footing as an individual debtor; that whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken.

" 'We do not concur with this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but in law it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers

to account, and may prevent any malversation of funds or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincide with them. When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds which in other circumstances are as much the absolute property of the corporation as any man's property is his.'

"With reference to the suggestion in this last paragraph it may be observed that the court does not attempt to determine who are proper parties to maintain a suit for the administration of the assets of an insolvent corporation. All that it decides is that when a court of equity does take into its possession the assets of an insolvent corporation, it will administer them on the theory that they in equity belong to the creditors and stockholders rather than to the corporation itself. In other words, and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation, the corporation is an entity, distinct from its stockholders as from its creditors. Solvent it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free, also, from the touch of a stockholder, who, though equitably interested in, has no legal right to, the property. Becoming insolvent the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust first for the creditors and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property as such for the direct benefit of either creditor or stockholder. . . . .

"A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud or sometimes even mere mismanagement in respect thereto; but as between itself and its cred-

itors the corporation is simply a debtor, and does not hold its property in trust or subject to a lien in their favor in any other sense than does an individual debtor. That is certainly the general rule, and if there be any exceptions thereto, they are not presented by any of the facts in this case. Neither the insolvency of the corporation nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon."

§ 192. Where a state court had appointed a receiver of the property of a corporation, Gray, J., in holding a stockholder's bill in the federal court not making the receiver party defendant demurrable for that reason, and for the further reason that a federal court would not interfere where a state court had taken jurisdiction and possession through its receiver, in Porter v. Sabin, 149 U. S. 473, said (p. 479):

"When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court, and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. Wiswall v. Sampson, 14 How. 52, 65; Peale v. Phipps, 14 How. 368, 374; Booth v. Clark, 17 How. 322, 331; Union Bank v. Kansas City Bank, 136 U. S. 223; Thompson v. Phenix Ins. Co., 136 U. S. 287, 297. It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation the court may permit to be put in suit in another tribunal against the receiver or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him. Barton v. Barbour, 104 U. S. 126; Texas & Pacific Ry. v. Cox, 145 U. S. 593, 601. The reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the

administration by that court of the estate in the receiver's hands to be interfered with by a court of the United States deriving its authority from another government, though exercising jurisdiction over the same territory. The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remains in its custody to be administered and distributed by it. Until the administration of the estate has been completed and the receivership terminated no court of the one government can by collateral suit assume to deal with rights of property or of action constituting part of the estate within the exclusive jurisdiction and control of the courts of the other. Wiswall v. Sampson, Peale v. Phipps and Barton v. Barbour above cited; Williams v. Benedict, 8 How. 107; Pulliam v. Osborne, 17 How. 471, 475; People's Bank v. Calhoun, 102 U. S. 256; Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294; In re Tyler, ante, 164."

CHAPTER X.

TERMINATION OF CORPORATE EXISTENCE.

§ 195. The termination of a corporation, like all matters of corporation law, is governed by the terms of the controlling statute.

A corporation is terminated in one of three ways: (1) by the expiration of the term of corporate existence set in the charter; (2) by voluntary dissolution; and (3) by forced dissolution or forfeiture.

At the time positively set by the statute, with due reference to the period fixed by the charter, as the limit of the corporate existence, the corporation ceases ipso facto to exist. Where, however, it is provided by the statute that the charter shall be forfeited or become void or other provision is made by the statute for the termination on the performance or failure to perform certain acts within the stated period of corporate existence, such provisions are generally construed not to be self-executing, and the corporation is not in such case ipso facto terminated, and its charter is simply held to be voidable on the institution by the state of a proper proceeding for the purpose.

It was formerly questioned whether in case of termination of a corporation the corporate property and assets reverted to the grantor or donor, or escheated to the state, or belonged to the stockholders or members of the corporation and should be divided among them.

§ 196. It is now, however, clearly established that in case of dissolution or forfeiture or other termination of the corporation its capital assets and property are to be reduced to cash, and after payment of the corporate debts are to be distributed among the stockholders or members of the corporation. This purpose is accomplished in different ways. In most jurisdictions it is now provided by statute that the positive limit of corporate existence shall not be reached

until the assets have been reduced and the corporate debts paid, it being usually provided that until then the corporation shall continue in existence for the purpose of suing or being sued, or that the trustees or directors, as the case may be, shall be continued in office for the reduction of assets and payment of debts, or both. In case the corporation has actually terminated under the statute, the court will appoint a receiver or trustee to wind up the corporate affairs, in a proper proceeding instituted for that purpose. In any event, and whatever the method and manner of the termination of corporate existence, the court will, at the instance of judgment creditors or stockholders, appoint a receiver to conserve and safeguard assets where the case shows a necessity for such appointment. Likewise, in any event the stockholders and members of a corporation on its termination are practically cotenants, entitled to divide the corporate property and assets remaining after the payment of the corporate debts and obligations.

§ 197. In holding that a bank is not dissolved by the appointment of a receiver on the failure of the bank to pay its circulating notes, Clifford, J., in Bank of Bethel v. Pahquioque Bank, 14 Wall. 383, p. 400, said:

"Beyond doubt the appointment of a receiver supersedes the power of the directors to exercise the incidental powers necessary to carry on the business of banking, as the receiver is required to take possession of the books, records and assets of every description of the association, and from that moment the association is forbidden to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, but the corporate franchise of the association is not dissolved, and the association as a legal entity continues to exist, as is shown to a demonstration by the fact that it is required safely to keep the money on hand belonging to it, and may deliver special deposits in its keeping to the rightful owners."

§ 198. In holding that a ground of forfeiture of the charter could not be taken advantage of by an individual but only by the state in a judicial proceeding for a dissolution, Nelson, J., in Frost v. Frostburg Coal Co., 24 How. 278, p. 283, said:

"Without pursuing the case further, the main ground upon which we intend to place the judgment of the court is, that the defendants were made a corporation by the charter, the persons named in it constituting the corporate body, clothed with the powers and privileges conferred upon it, and were capable of taking and holding real estate; and, second, even if it were otherwise, and some irregularities occurred in the organization of the company, inasmuch as no act made a condition precedent to the existence of the corporation has been omitted, or its nonperformance shown, a party dealing with the company is not permitted to set up the irregularity. The courts are bound to regard it as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the government that created it."

§ 199. In holding that where a corporation was dissolved by a quo warranto proceeding forfeiting its charter and its property turned over to a trustee, the stockholders were entitled to maintain a bill in equity against the trustee for an accounting, Campbell, J., in Bacon et al. v. Robertson et al., 18 How. (U. S.) 480, after an elaborate examination of English authorities, said (p. 488):

"All the other trusts having been fulfilled, the stockholders are entitled to such an administration as will be most beneficial to them, or to a sale of the trust property in the manner prescribed by the statute of Mississippi. Nor is the objection to the form of the suit tenable. If the trust estate had been liquidated and the interests of the stockholders ascertained, any stockholder might have maintained a suit for his aliquot share without including any other stockholder. Smith v. Snow, 3 Mad. C. R. 310."

§ 200. In holding a debt due the corporation not extinguished by forfeiture of the charter, Davis, J., in Lum v. Robertson, 6 Wall. 277, p. 279, said:

"The decision of this court in Bacon et al. v. Robertson disposes of this case.

"The Commercial Bank of Natchez, Mississippi, by judicial forfeiture, was deprived of its charter, and Robertson appointed a trustee to wind up its affairs. In discharge of his trust, having paid all the debts of the insolvent corporation, a large surplus remained. The object of the suit in Bacon v. Robertson was to establish the title of the stockholders to this surplus. Robertson refused to distribute the effects in his

hands, claiming that, since the dissolution of the corporation, the stockholders had no rights which this court could recognize. But the court in an elaborate opinion decide that the trustee cannot deny the title of the stockholders to a distribution, and that, by the laws of Mississippi and the general principles of equity jurisprudence, the surplus of the assets which may remain after the payment of the debts and expenses belongs to the stockholders of the bank. . . . . Lum, a delinquent debtor of the bank, cannot plead the extinguishment of his debt by the judgment of forfeiture, for the court (in the case cited) say the debt exists and can be recovered, and that it is the duty of the trustee to reduce the property of the bank to money and distribute it among the stockholders."

§ 201. In holding that a judgment could not be revived by scire facias against a corporation which had surrendered its charter, Story, J., in Mumma v. Potomac Co., 8 Pet. 280, said (p. 286):

"A corporation by the very terms and nature of its political existence is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for willful misuser and nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic and to contract with reference to them. And it would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter.

"The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of bona fide purchasers; but is still held in trust for the company or for the stockholders thereof, at the time of its dissolution in any mode permitted by the local laws."

§ 202. In holding that a state could, without impairing the obligation of its contract, perpetually enjoin an insolvent life insurance company from doing business in a proceeding instituted to terminate its existence, Harlan, J., in Chicago Life Ins. Co. v. Needles, 113 U. S. 574, p. 580, said:

"The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created, were granted subject to the condition that the privileges and franchises conferred

upon it should not be abused, or so employed as to defeat the ends for which it was established, and that when so abused or misemployed, they might be withdrawn or reclaimed by the state, in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. Terret v. Taylor, 9 Cranch, 43, 51; Angell & Ames on Corporations, 9th ed., § 774, note." (See, also, Wells Co. v. Gastonia Cotton Mfg. Co., 198 U. S. 177.)

§ 203. In holding that on the dissolution of a corporation at the expiration of its chartered term of existence each stockholder is entitled to have the corporate property converted into money for distribution and that the majority of the stockholders cannot otherwise dispose of the property without the consent of each minority stockholder, Miller, J., in Mason v. Pewabic Mining Co., 133 U. S. 50, p. 58, said:

"With regard to the main question, the power of the directors and of the majority of the corporation to sell all of the assets and property of the Pewabic Mining Company to the new corporation under the existing circumstances of this case, we concur with the circuit court. It is earnestly argued that the majority of the stockholders—such a relatively large majority in interest—have a right to control in this matter, especially as the corporation exists for no other purpose but that of winding up its affairs, and that, therefore, the majority should control in determining what is for the interest of the whole, and as to the best manner of effecting this object. It is further said that in the present case the dissenting stockholders are not compelled to enter into a new corporation with a new set of corporators, but have their option, if they do not choose to do this, to receive the value of their stock in money.

"It seems to us that there are two insurmountable objections to this view of the subject. The first of these is that the estimate of the value of the property which is to be transferred to the new corporation and the new set of stockholders is an arbitrary estimate made by this majority, and without any power on the part of the dissenting stockholders to take part or to exercise any influence in making this estimate. They are therefore reduced to the proposition that they must go into this new company, however much they may be convinced that it is not likely to be successful or whatever other objections they may have to becoming members of that corporation, or they must receive for the property which they

have in the old company a sum which is fixed by those who are buying them out. The injustice of this needs no comment. If this be established as a principle to govern the winding up of dissolving corporations, it places any unhappy minority, as regards the interest which they have in such corporation, under the absolute control of a majority, who may themselves, as in this case, constitute the new company, and become the purchasers of all the assets of the old company at their own valuation.

"The other objection is that there is no superior right in two or three men in the old company, who may hold a preponderance of the stock, to acquire an absolute control of the whole of it, in the way which may be to their interest, or which they may think to be for the interest of the whole. So far as any legal right is concerned, the minority of the stockholders has as much authority to say to the majority as the majority has to say to them, 'We have formed a new company to conduct the business of this old corporation, and we have fixed the value of the shares of the old corporation. We propose to take the whole of it and pay you for your shares at that valuation unless you come into the new corporation taking shares in it in payment of your shares in the old one.' When the proposition is thus presented, in the light of an offer made by a very small minority to a very large majority who object to it, the injustice of the proposition is readily seen; yet we know of no reason or authority why those holding a majority of the stock can place a value upon it at which a dissenting minority must sell or do something else which they think is against their interest more than a minority can do.

"We do not see that the rights of the parties in regard to the assets of this corporation differ from those of a partnership on its dissolution, and on that subject Lindley on Partnership says, book 3, chapter 10, section 6, subdivision 4, page 555, original edition:

" 'In the absence of a special agreement to the contrary, the right of each partner on a dissolution is to have the partnership property converted into money by a sale, even though a sale may not be necessary to the payment of debts. This mode of ascertaining the value of the partnership effects is adopted by courts of equity, unless some other course can be followed consistently with the agreement between the partners, and, even where the partners have provided that their shares shall be ascertained in some other way, still if, owing to any circumstance, their agreement in this respect cannot be carried out, or if their agreement does not extend to the event

which has in fact arisen, realization of the property by a sale is the only alternative which a court of equity can adopt. . . . . We do not say that there may not be circumstances presented to a court of chancery which is winding up a dissolved corporation and distributing its assets that will justify a decree ascertaining their value or the value of certain parts of them and making a distribution to partners or stockholders on that basis; but this is not the general rule by which the property in such cases is disposed of in the absence of an agreement.' ''

PERIOD OF CORPORATE EXISTENCE.

§ 204. The period of existence of a corporation is matter of construction of the charter, and where no time is specified other than to give "perpetual succession," the period is construed as indefinite (Snell v. Chicago, 133 Ill. 413; State ex rel. Walker v. Payne, 129 Mo. 468); but language indicating a particular period for exercise of corporate powers will control (State ex rel. Walker v. Payne, 129 Mo. 468), and the time limited may be extended by the legislature in absence of constitutional restriction. (Attorney General v. Perkins, 73 Mich. 303.) Where the certificate or license of the Secretary of State specifies a different period than the articles of agreement, the certificate governs (Bushnell v. Consol. Ice Mach. Co., 138 Ill. 67); and in case the articles specify a period exceeding the period authorized or permitted by statute, the excess period is merely disregarded. (People v. Cheeseman, 7 Colo. 376.)

§ 205. On the expiration of the time limited by the charter as properly construed, the corporation is at an end, unless its life be extended by the legislature. (Sturges v. Vanderbilt, 73 N. Y. 384; Asheville etc. T. v. Aston, 92 N. C. 578.) An action against an expired company is properly abated (Bank v. McLaughlin, 2 Cranch C. C. 20; Foster v. Essex Bank, 16 Mass. 244; People v. Anderson etc. Co., 76 Cal. 190; Meilrel v. German Sav. Fund Soc., 16 Ind. 181), but otherwise if the statute has extended the period for the company to wind up (Pomeroy v. State Bank, 68 U. S. 23; Miller v.

Newburg Arrel Coal Co., 31 W. Va. 836; Foster v. Essex Bank, 16 Mass. 244). Estoppel will not avail to prevent setting up expiration of corporate existence. (Ensey v. Cleveland & St. L. R. Co., 10 Ind. 178; Krutz v. Paola Town Co., 20 Kan. 397; Dobson v. Simonton, 86 N. C. 492; Ft. Wayne & B. Turnp. Co. v. Deam, 10 Ind. 563.)

In the absence of express statutory limitation, the corporation continues until dissolved by decree (People v. Cheeseman, 7 Colo. 376; Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524), but where the charter fixes a definite time, the corporation at the time fixed ceases without decree of court. (People v. Anderson etc. Road Co., 76 Cal. 190, 18 Pac. 308. For further authorities, see Thompson, 2d ed., § 267; 33 L. R. A. 576, note.)

CHAPTER XI.

FOREIGN CORPORATIONS.

§ 210. A corporation exists only within the territorial jurisdiction of the statute under which it is created.

It may be and is, however, recognized in other states or territorial jurisdictions as so existing in its home state, and it is now well established that if authorized by its charter, it may through agents sue, contract and otherwise exercise its charter powers in other states, unless affirmatively prohibited from or restricted in so doing by the statutes of the extra-territorial state or jurisdiction. A corporation in its outside dealings, i. e., a foreign corporation, is governed as to its powers, rights and liabilities by its charter and the laws of its home state, subject to the positive limitations of the outside state. It is well established that the outside state may impose such restrictions as it deems wise on the exercise within its borders of powers by foreign corporations, provided its regulations are within the scope of its legislative body and not unconstitutional, as is, e. g., an attempt to deny the right to sue in the federal courts or any attempted regulation of interstate commerce.

§ 211. In holding that a banking corporation of Georgia could, through its agent, legally discount a bill of exchange in Alabama, Taney, C. J., in Bank of Augusta v. Earle, 13 Pet. 517, said (p. 587):

"The nature and character of a corporation created by a statute and the extent of the powers which it may lawfully exercise have upon several occasions been under consideration in this court. In the case of Head v. Providence Ins. Co., 2 Cranch, 127, Chief Justice Marshall, in delivering the opinion of the court, said: 'Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to

be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers; and to determine whether it can complete a contract by such communications as are in this record.' In the case of Dartmouth College v. Woodward, 4 Wheat. 636, the same principle was again decided by the court. 'A corporation,' said the court, 'is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.' And in the case of the Bank of the United States v. Dandridge, 12 Wheat. 64, where the question in relation to the powers of corporations and their mode of action were very carefully considered, the court said: 'But whatever may be the implied powers of aggregate corporations by the common law and the modes by which those powers are to be carried into operation, corporations created by statute must depend, both for their powers and the mode of exercising them upon the true construction of the statute itself.'

"It cannot be necessary to add to these authorities. And it may be safely assumed that a corporation can make no contracts and do no acts, either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done by such officers or agents and in such manner as the charter authorizes. And if the law creating a corporation does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the state, all contracts made by it in other states would be void. The charter of the Bank of Augusta authorizes it in general terms to deal in bills of exchange, and, consequently, gives it the power to purchase foreign bills as well as inland; in other words, to purchase bills payable in another state. The power thus given clothed the corporation with the right to make contracts out of the state in so far as Georgia could confer it. For whenever it purchased a foreign bill and forwarded it to an agent to present for acceptance, if it was honored by the drawee, the contract of acceptance was necessarily made in another state; and the general power to purchase bills, without any restriction as to place, by its fair and natural import, authorized the bank to make such purchases wherever it was found most convenient and profitable to the institution, and also to employ suitable agents for that purpose. The purchase of the bill in question was therefore the exercise of one of the powers which the bank possessed under its charter, and was sanctioned

by the law of Georgia creating the corporation so far as that state could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction.

§ 212. "But it has been urged in the argument that notwithstanding the powers thus conferred by the terms of the charter, a corporation, from the very nature of its being, can have no authority to contract out of the limits of the state; that the laws of a state can have no extraterritorial operation, and that as a corporation is the mere creature of a law of the state, it can have no existence beyond the limits in which that law operates, and that it must necessarily be incapable of making a contract in another place. It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law; and where that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person for certain purposes, in contemplation of law, and has been recognized as such by the decisions of this court. It was so held in the case of the United States v. Amedy, 11 Wheat. 412, and in Beaston v. Farmers' Bank of Delaware, 12 Pet. 125. Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside and where they are not personally present when the contract is made, and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person by its agents to make a contract within the scope of its limited powers in a sovereignty in which it does not reside, provided such contracts are permitted to be made by them by the laws of the place?

"The corporation must no doubt show that the law of its creation gave it authority to make such contracts through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person in the state of its creation is acknowledged and recognized by the law of the nation where the deal-

ing takes place; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed.

§ 213. "Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed, whether by the comity of nations, and between these states, the corporations of one state are permitted to make contracts in another. It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; and courts of justice have always expounded and executed them according to the laws of the place in which they were made; provided, that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests. But it contributes so largely to promote justice between individuals and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said in Story's Conflict of Laws, 37, that 'In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of the courts, but the comity of the nations, which is administered and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided.'

§ 214. "Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction; and we can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the state or injurious to its interests. It is nothing more than the admission of the existence of an artificial person created by the law of another state and clothed with the power of making

certain contracts; it is but the usual comity of recognizing the law of another state. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts, since the case of Henriques v. Dutch West India Co., decided in 1729, 2 Ld. Raym. 1532. And it is a matter of history which this court are bound to notice that corporations created in this country have been in the open practice for many years past of making contracts in England of various kinds and to very large amounts; and we have never seen a doubt suggested there of the validity of these contracts by any court or any jurist. It is impossible to imagine that any court in the United States would refuse to execute a contract by which an American corporation had borrowed money in England; yet if the contracts of corporations made out of the state by which they were created are void, even contracts of that description could not be enforced.

§ 215. "It has, however, been supposed that the rules of comity between foreign nations do not apply to the states of this Union; that they extend to one another no other rights than those which are given by the constitution of the United States; and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a state has adopted the comity of nations toward the other states, as a part of its jurisprudence; or that it acknowledges any rights but those which are secured by the constitution of the United States. The court think otherwise. The intimate union of these states, as members of the same great political family, the deep and vital interests which bind them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship and kindness toward one another than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will and the legal presumption is at once at an end. But until this is done, upon what grounds could this court refuse to administer the law of international comity between these states? They are sovereign states, and the history of the past and the events which are daily occurring furnish the strongest evidence that they have adopted toward each other the laws of comity in their fullest extent. Money is frequently borrowed in one state by a corporation created in another. The numerous banks established by different states are in the constant habit of contracting and deal-

ing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other states and suffered to make contracts, without any objection on the part of the state authorities. These usages of commerce and trade have been so general and public and have been practiced for so long a period of time, and so generally acquiesced in by the states, that the court cannot overlook them when a question like the one before us is under consideration. The silence of the state authorities while these events are passing before them show their assent to the ordinary laws of comity which permit a corporation to make contracts in another state. But we are not left to infer it merely from the general usages of trade and the silent acquiescence of the states. It appears from the cases cited in the argument, which it is unnecessary to recapitulate in this opinion, that it has been decided in many of the state courts,—we believe in all of them where the question has arisen,—that a corporation of one state may sue in the courts of another. If it may sue, why may it not make a contract? The right to sue is one of the powers which it derives from its charter. If the courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit and permit it to exercise that power, why should not its existence be recognized for other purposes and the corporation permitted to exercise another power which is given to it by the same law and the same sovereignty—where the last-mentioned power does not come in conflict with the interest or policy of the state? There is certainly nothing in the nature and character of a corporation which could justly lead to such a distinction, and which should extend to it the comity of suit and refuse to it the comity of contract. If it is allowed to sue, it would of course be permitted to compromise, if it thought proper, with its debtor; to give him time; to accept something else in satisfaction; to give him a release; and to employ an attorney for itself to conduct its suit. These are all matters of contract, and yet are so intimately connected with the right to sue, that the latter could not be effectually exercised if the former were denied.

§ 216. "We turn, in the next place, to the legislation of the states. So far as any of them have acted on this subject, it is evident that they have regarded the comity of contract as well as the comity of suit to be a part of the law of the state unless restricted by statute. Thus a law was passed by the state of Pennsylvania March 10, 1810, which prohibited foreigners and foreign corporations from making contracts of insurance

against fire and other losses mentioned in the law. In New York, also, a law was passed March 18, 1814, which prohibited foreigners and foreign corporations from making in that state insurances against fire; and by another law passed April 21, 1818, corporations chartered by other states are prohibited from keeping any office of deposit for the purpose of discounting promissory notes or carrying on any kind of business which incorporated banks are authorized by law to carry on. The prohibition of certain specified contracts by corporations in these laws is by necessary implication an admission that other contracts may be made by foreign corporations in Pennsylvania and New York; and that no legislative permission is necessary to give them validity. And the language of these prohibitory acts most clearly indicates that the contracts forbidden by them might lawfully have been made before these laws were passed. Maryland has gone still further in recognizing this right. By a law passed in 1834 that state has prescribed the manner in which corporations not chartered by the state 'which shall transact or shall have transacted business' in the state may be sued in its courts upon contracts made in the state. The law assumes in the clearest manner that such contracts were valid, and provides a remedy by which to enforce them.

"In the legislation of Congress, also, where the states and the people of the several states are all represented, we shall find proof of the general understanding in the United States that by the law of comity among the states, the corporations chartered by one were permitted to make contracts in the others. By the act of Congress of June 23, 1836 (5 U. S. Stats. 52), regulating the deposits of public money, the Secretary of the Treasury was authorized to make arrangements with some bank or banks to establish an agency in the states and territories where there was no bank or none that could be employed as a public depository to receive and disburse the public money which might be directed to be there deposited. Now, if the proposition be true that a corporation created by one state cannot make a valid contract in another, the contracts made through this agency in behalf of the bank out of the state where the bank itself was chartered would all be void, both as respected the contracts with the government and the individuals who dealt with it. How could such an agency, upon the principles now contended for, have performed any of the duties for which it was established?

"But it cannot be necessary to pursue the argument further. We think it is well settled that by the law of comity among nations a corporation created by one sovereignty is per-

mitted to make contracts in another and to sue in its courts, and that the same law of comity prevails among the several sovereignties of this Union. The public and well-known and long-continued usages of trade; the general acquiescence of the states; the particular legislation of some of them, as well as the legislation of Congress,—all concur in proving the truth of this proposition.

"But we have already said that this comity is presumed from the silent acquiescence of the state. Whenever a state sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made."

§ 217. In holding that a corporation is to be regarded as a citizen of the state of its creation for the purpose of determining the question of diversity of citizenship, Field, J., in Railway Co. v. Whitton, 13 Wall. 270, said (p. 283):

"Although a corporation, being an artificial body created by legislative power, is not a citizen within several provisions of the Constitution, yet it has been held, and that must now be regarded as settled law, that where rights of action are to be enforced, it will be considered as a citizen of the state where it was created within the clause extending the judicial powers of the United States to controversies between citizens of the different states."

§ 218. In holding that a corporation chartered in Virginia, whose charter was re-enacted in Maryland and which was authorized by Congress to extend its road through the District of Columbia, was one corporation amenable to the courts of the District, Swayne, J., in Railroad Co. v. Harris, 12 Wall. 65, said (p. 81):

"A corporation is in law, for civil purposes, deemed a person. It may sue and be sued, grant and receive and do all other acts not ultra vires which a natural person could do. The chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter. It cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented,

and will be bound accordingly. For the purposes of federal jurisdiction it is regarded as if it were a citizen of the state where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted. There is a presumption of law which is conclusive.

"We see no reason why several states cannot by competent legislation unite in creating the same corporation or in combining several pre-existing corporations into a single one. . . . . Nor do we see any reason why one state may not make a corporation of another state, as there organized and conducted, a corporation of its own quo ad hoc any property within its territorial jurisdiction. That this may be done was distinctly held in the Ohio and Mississippi R. R. Co. v. Wheeler, 1 Black, 297. It is well settled that corporations of one state may exercise their faculties in another so far and on such terms and to such extent as may be permitted by the latter. We hold that the case before us is within this latter category. The question is always one of legislative intent and not of legislative power or possibility."

§ 219. In holding that bondholders in a Canadian corporation held the bonds subject to a certain "Arrangement Act" of the Canadian parliament modifying the bonds in certain ways, Waite, C. J., in Canada Southern R. Co. v. Gebhard, 109 U. S. 527, said (p. 537):

"A corporation 'must dwell in the place of its creation and cannot migrate to another sovereignty' (Bank of Augusta v. Earle, 13 Pet. 588), though it may do business in all places where its charter allows and the local laws do not forbid. Railroad v. Koontz, 104 U. S. 12. But wherever it goes for business it carries its charter, as that is the law of its existence (Relf v. Rundel, 103 U. S. 226), and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (Paul v. Virginia, 8 Wall. 168), but if admitted it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken both by the government and those who deal with it as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person

who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government affecting the powers and obligations of the corporation with which he voluntarily contracts as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself who are subjects of the government in respect to the operation and effect of their contracts with the corporation will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation under the authority of such laws which discharges it from liability there discharges it everywhere."

§ 220. In holding that the making by an Ohio corporation of a single contract in Colorado was not doing business in the state, subjecting the company to the statutory regulations of Colorado, Woods, J., in Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, said (p. 732):

"The right of the people of a state to prescribe generally by its constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the state has been settled by this court. Bank of Augusta v. Earle, 13 Pet. 519; Paul v. Virginia, 8 Wall. 168; Ducat v. Chicago, 10 Wall. 410. The plaintiff in error does not deny this right, but insists that upon a proper construction of section 10 of article 15 of the Constitution of Colorado, and of section 23 of the act of 1877, its contract with the defendant was valid, and that its suit should have been maintained.

"As the clause in the Constitution and the act of the legislature relate to the same subject like statutes in pari materia, they are to be construed together. Eskridge v. State, 25 Ala. 30. The act was passed by the first legislature that assembled after the adoption of the Constitution and has been allowed to remain upon the statute book to the present time. It must therefore be considered as a contemporary interpretation entitled to much weight. Stuart v. Laird, 1 Cranch,

299; Martin v. Hunter, 1 Wheat. 304; Cohens v. Virginia, 6 Wheat. 264; Adams v. Story, 1 Paine, 79, 90.

"It must be conceded that if the contract on which the suit was brought was made in violation of a law of the state, it cannot be enforced in any court sitting in the state charged with the interpretation and enforcement of its laws. Bank of the United States v. Owens, 2 Pet. 527; Groves v. Slaughter, 15 Pet. 448; Harris v. Runnels, 12 How. 79; Brown v. Tarkington, 3 Wall. 377; Davidson v. Lanier, 4 Wall. 447; Hanauer v. Doane, 12 Wall. 342; Wheeler v. Russell, 17 Mass. 258; Law v. Hodson, 11 East, 300; Little v. Poole, 9 B. & C. 192; Thorne v. Travelers' Ins. Co., 80 Pa. 15; Allen v. Hawks, 13 Pick. 79, 82; Roche v. Ladd, 1 Allen, 436, 441; In re Comstock, 3 Saw. 218. So far as appears by the record, the plaintiff had no principal place of business nor any place of business whatever in the state of Colorado, and the making of the contract set out in the complaint was the only business ever done by it or that it ever purposed to do in that state.

"The question therefore is, whether upon a true construction of the Constitution and statute the making of the contract which the plaintiff seeks to enforce was, under the circumstances stated, forbidden.

"The contention of the defendants in error is that the prohibition against the doing of any business in the state by a foreign corporation except upon the prescribed condition includes the doing of any single and isolated act of business whatever. Thus broadly stated, it is clear that the interpretation of the defendants cannot be sustained. In a case involving the construction of the statute, the supreme court of Colorado held that a foreign corporation might, without complying with the provisions of the statute, maintain an action in the courts of the state to recover damages for trespass to its real estate. The court said: 'The prohibition extends to doing business before the compliance with the terms of the statute. We do not think this an abridgment of the right of a foreign corporation to sue. It extends only to the exercise of the powers by which it may be said to ordinarily transact or carry on its business. To what extent the exercise of these powers is affected we do not decide.' Utley v. The Clark Gardner Min. Co., 4 Colo. 369. So it is clear the statute cannot be construed to impose upon a foreign corporation limitations of its right to make contracts in the state for carrying on commerce between the states, for that would make the act an invasion of the exclusive right of Congress to regulate commerce among the sev-

eral states. Paul v. Virginia, 8 Wall. 168. The prohibition against doing any business cannot, therefore, be literally interpreted."

§ 221. In holding that a provision in a state statute requiring a foreign corporation to stipulate that it would not remove suits to the federal courts to be void, Blatchford, J., in Barron v. Burnside, 121 U. S. 186, said, relative to the right of the corporation to remove suits (p. 200):

"Its right equally with any individual citizen to remove into the federal court under the laws of the United States such suits as are mentioned in the third section of the Iowa statute is too firmly established by the decisions of this court to be questioned at this day; and the state of Iowa might as well pass a statute to deprive an individual citizen of another state of his right to remove such suits.

"As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the constitution and laws of the United States, the statute requiring the permit must be held to be void.

"The question as to the right of a state to impose upon a corporation engaged in interstate commerce the duty of obtaining a permit from the state as a condition of its right to carry on such commerce is a question which it is not necessary to decide in this case. In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the constitution and laws of the United States. La Fayette Ins. Co. v. French, 18 How. 404, 407; Ducat v. Chicago, 10 Wall. 410, 415; Insurance Co. v. Morse, 20 Wall. 445, 456; St. Clair v. Cox, 106 U. S. 350, 356; Phila. Fire Assn. v. New York, 119 U. S. 110, 120."

ACTIONS AND SUITS BY AND AGAINST FOREIGN CORPORATIONS.

§ 222. A nonresident may sue another nonresident in the jurisdiction where the defendant is personally served with process. (Rice v. Brown, 81 Me. 56; Johnston v. Trade Ins. Co., 132 Mass. 432.)

Since corporations do not and cannot exist in fact outside the jurisdiction of the laws under which they are created and exist, foreign corporations or those not created by the state of the jurisdiction invoked are necessarily and essentially nonresident. (Nelins v. Edinburg American Land Mortgage Co., 92 Ala. 157.)

Foreign corporations, therefore, are, like nonresidents, allowed to sue wherever jurisdiction of the defendant, whether a natural or artificial person, is obtained. (National Teleph. Mfg. Co. v. Du Bois, 165 Mass. 117; Bank of Augusta v. Earle, 13 Pet. 519; Pullman Palace Co. v. Lawrence, 74 Miss. 782; Lumbard v. Aldrich, 8 N. H. 31; Silver Lake Bank v. North, 4 Johns. Ch. 370; Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367.) Since a person, whether natural or artificial, cannot be sued unless in some manner served with process, it is the established rule that a foreign corporation cannot be sued unless it has subjected itself to the jurisdiction in question, and that process cannot be served upon it, without its consent, express or implied, outside the jurisdiction of its creation. (Barnett v. Chicago & L. H. R. Co., 4 Hun, 114; Pullman Palace Car Co. v. Harrison, 122 Ala. 149; Aldrich v. Anchor etc. Co., 24 Or. 32; Lathrop v. Union P. R. Co., 7 D. C. 111.)

A corporation may, however, voluntarily submit itself to be served with process in jurisdictions foreign to its creation, and where a state prescribes conditions with which foreign corporations must comply in order to do business in the state, a corporation doing business in the state is held thereby to have tacitly submitted itself to the service of process and to the jurisdiction of the courts of the state.

§ 223. In St. Clair v. Cox, 106 U. S. 350, in holding that in an action in the federal court a judgment obtained in the state courts against a foreign corporation was not admissible in evidence, for the reason that the state court did not obtain jurisdiction of the corporation, since though its agent was served within the state it did not appear that the corporation was doing business in the state, and therefore had not sub-

mitted itself to the jurisdiction of the state courts, Field, J., said (p. 354):

"Formerly, it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the state by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Mr. Chief Justice Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his state, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

"In McQueen v. Middleton Manufacturing Co., decided in 1819, the supreme court of New York, in considering the question whether the law of that state authorized an attachment against the property of a foreign corporation, expressed the opinion that a foreign corporation could not be sued in the state, and gave as a reason that the process must be served on the head or principal officer within the jurisdiction of the sovereignty where the artificial body existed; observing that if the president of a bank went to New York from another state, he would not represent the corporation there; and that 'his functions and his character would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived this character.' 16 Johns. (N. Y.) 5. The opinion thus expressed was not, perhaps, necessary to the decision of the case, but nevertheless it has been accepted as correctly stating the law. It was cited with approval by the supreme court of Massachusetts, in 1834, in Peckham v. North Parish in Haverhill, the court adding that all foreign corporations were without the jurisdiction of the process of the courts of the commonwealth. 16 Pick. (Mass.) 274. Similar expressions of opinion are found in numerous decisions, accompanied sometimes with suggestions that the doctrine might be otherwise if the foreign corporation sent its officer to reside in the state and transact business there on its account. Libbey v. Hodgdon, 9 N. H. 394; Moulin v. Trenton Insurance Co., 24 N. J. L. 222.

§ 229. "This doctrine of the exemption of a corporation from suit in a state other than that of its creation was the cause of much inconvenience and often of manifest injustice. The

great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one state, they carry on the most extensive operations in other states. To meet and obviate this inconvenience and injustice, the legislatures of several states interposed, and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the state where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other states and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the state of its creation. As it was protected by the laws of those states, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts for obligations and liabilities there incurred.

"All that there is in the legal residence of a corporation in the state of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the state. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the states for which they are respectively appointed when it is called to legal responsibility for their transactions.

"The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents. Serving process on its agents in other states, for matters within the sphere of their agency, is, in effect, serving process on it as much so as if such agents resided in the state where it was created.

§ 230. "A corporation of one state cannot do business in another state without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose. As said by this court in Lafayette Insurance Co. v. French, 'These conditions must be deemed

valid and effectual by other states and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.' 18 How. 404; Paul v. Virginia, 8 Wall. 168.

"The state may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. The decision of this court in Lafayette Ins. Co. v. French, to which we have already referred, sustains these views.

"The state of Michigan permits foreign corporations to transact business within her limits. Either by express enactment, as in the case of insurance companies, or by her acquiescence, they are as free to engage in all legitimate business as corporations of her own creation. Her statutes expressly provide for suits being brought by them in her courts; and for suits by attachment being brought against them in favor of residents of the state. And in these attachment suits they authorize the service of a copy of the writ of attachment, with a copy of the inventory of the property attached, on 'any officer, member, clerk or agent of such corporation' within the state, and give to a personal service of a copy of the writ and of the inventory on one of these persons the force and effect of personal service of a summons on a defendant in suits commenced by summons.

§ 231. "It thus seems that a writ of foreign attachment in that state is made to serve a double purpose—as a command to the officer to attach property of the corporation, and as a summons to the latter to appear in the suit. We do not, however, understand the laws as authorizing the service of a copy of the writ, as a summons, upon an agent of a foreign corporation, unless the corporation be engaged in business in the state, and the agent be appointed to act there. We so construe the words 'agent of such corporation within this state.' They do not sanction service upon an officer or agent of the corporation who resides in another state and is only casually in the state, and not charged with any business of the corporation there. The decision in Newell v. Great Western Railway Co., reported in the 19th of Michigan reports, supports this view, although that was the case of an attempted service of a declaration as the commencement of the suit. The defendant was a Canadian corporation, owning and operating a railroad from Suspension Bridge in Canada to the Detroit line at Windsor, opposite Detroit, and carrying passengers in connection with the Michigan Central Railroad Company, upon tickets sold by such companies respectively. The suit was commenced in Michigan, the declaration alleging a contract by the defendant to carry the plaintiff over its road, and its violation of the contract by removing him from its cars at an intermediate station. The declaration was served upon Joseph Price, the treasurer of the corporation, who was only casually in the state. The corporation appeared specially to object to the jurisdiction of the court, and pleaded that it was a foreign corporation and had no place of business or agent or officer in the state, or attorney to receive service of legal process, or to appear for it; and that Joseph Price was not in the state at the time of service on him on any official business of the corporation. The plaintiff having demurred to this plea, the court held the service insufficient. 'The corporate entity,' said the court, 'could by no possibility enter the state, and it could do nothing more in that direction than to cause itself to be represented here by its officers or agents. Such representation would, however, necessarily imply something more than the mere presence here of a person possessing, when in Canada, the relation to the company of an officer or agent. To involve the representation of the company here, the supposed representative would have to hold or enjoy in this state an actual present official or representative status. He would be required to be here as an agent or officer of the corporation, and not as an isolated individual. If he should drop the official or representative

character at the frontier, if he should bring that character no further than the territorial boundary of the government to whose laws the corporate body itself, and consequently the official positions of its officers also, would be constantly indebted for existence, it could not, with propriety, be maintained that he continued to possess such character by force of our statute. Admitting, therefore, for the purpose of this suit, that in given cases the foreign corporation would be bound by service on its treasurer in Michigan, this could only be so when the treasurer, the then official, the officer then in a manner impersonating the company, should be served. Joseph Price was not here as the treasurer of the defendants. He did not then represent them. His act in coming was not the act of the company, nor was his remaining the business or act of any besides himself. He had no principal, and he was not an agent. He had no official status or representative character in this state.' p. 344.

"According to the view thus expressed by the supreme court of Michigan, service upon an agent of a foreign corporation will not be deemed sufficient, unless he represents the corporation in the state. This representation implies that the corporation does business, or has business, in the state for the transaction of which it sends or appoints an agent there. If the agent occupies no representative character with respect to the business of the corporation in the state, a judgment rendered upon service on him would hardly be considered in other tribunals as possessing any probative force. In a case where similar service was made in New York upon an officer of a corporation of New Jersey accidentally in the former state, the supreme court of New Jersey said that a law of another state which sanctioned such service upon an officer accidentally within its jurisdiction was 'so contrary to natural justice and to the principles of international law, that the courts of other states ought not to sanction it.' Moulin v. Trenton Insurance Co., 24 N. J. L. 222, 234."

§ 232. In Barrow Steamship Co. v. Kane, 170 U. S. 100, it was held that a resident of New Jersey could maintain in the United States circuit court for the southern district of New York an action, for a tort committed in Ireland, against the defendant, a foreign corporation doing business in New York through duly accredited agents, but not having designated an agent under the statute, Gray, Justice, saying (p. 105):

"It was contended in behalf of the steamship company that being a foreign corporation, no suit could be maintained

against it in personam in this country without its consent, express or implied; that by doing business in the state of New York it consented to be sued only as authorized by the statutes of the state; that the jurisdiction of the courts of the United States held within the state depended on the authority given by those statutes; that the statutes of New York conferred no authority upon any court to issue process against a foreign corporation in an action by a nonresident, and for a cause not arising within the state; and therefore that the circuit court acquired no jurisdiction of this action brought against a British corporation by a citizen and resident of New Jersey. . . . .

§ 233. "The manifest injustice which would ensue if a foreign corporation, permitted by a state to do business therein and to bring suits in its courts, could not be sued in those courts, and thus, while allowed the benefits, be exempt from the burdens of the laws of the state, has induced many states to provide by statute that a foreign corporation making contracts within the state shall appoint an agent residing therein, upon whom process may be served in actions upon such contracts. This court has often held that wherever such a statute exists, service upon an agent so appointed is sufficient to support jurisdiction of an action against the foreign corporation, either in the courts of the state or, when consistent with the acts of Congress, in the courts of the United States held within the state; but it has never held the existence of such a statute to be essential to the jurisdiction of the circuit courts of the United States. Lafayette Ins. Co. v. French, 18 How. 404; Ex parte Schollenberger, 96 U. S. 369; New England Ins. Co. v. Woodworth, 111 U. S. 138, 146; Shaw v. Quincy Mining Co., 145 U. S. 444, 452. . . . . The liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there. . . . . In England, the right of a foreign corporation doing business in England to sue in the English courts was long ago recognized; and its liability to be subjected to suit in those courts by service made upon one of its principal officers residing and representing it within the realm has been fully established by recent decisions. Newby v. Van Oppen, L. R. 7 Q. B. 293; Haggin v. Comptoir d'Escompte de Paris, 23 Q. B. D. 519.

§ 234. "In the courts of several states of the Union the like view has prevailed. Libbey v. Hodgdon, 9 N. H. 394; March v.

Eastern Railroad Co., 40 N. H. 548, 579; Day v. Essex County Bank, 13 Vermont, 97; Moulin v. Trenton Ins. Co., 1 Dutcher (25 N. J. L.), 57; Bushel v. Commonwealth Ins. Co., 15 S. & R. 173; North Missouri Railroad v. Akers, 4 Kansas, 453, 469; Council Bluffs Co. v. Omaha Co., 49 Nebraska, 537. The courts of New York and Massachusetts, indeed, have declined to take jurisdiction of suits against foreign corporations, except so far as it has been expressly conferred by statutes of the state. McQueen v. Middleton Manuf. Co., 16 Johns. 5; Robinson v. Oceanic Steam Navigation Co., 112 N. Y. 315; Desper v. Continental Water Meter Co., 137 Mass. 252. But the jurisdiction of the circuit courts of the United States is not created by, and does not depend upon, the statutes of the several states. In the circuit courts of the United States there have been conflicting opinions, but the most satisfactory ones are those of Judge Drummond and Judge Lowell in favor of the liability of foreign corporations to be sued. Wilson Packing Co. v. Hunter, 8 Bissell, 429; Hayden v. Androscoggin Mills, 1 Fed. Rep. 93. . . . . On the other hand, upon the fundamental principle that no one shall be condemned unheard, it is well settled that in a suit against a corporation of one state brought in a court of the United States held within another state, in which the corporation neither does business nor has authorized any person to represent it, service upon one of its officers or employees found within the state will not support the jurisdiction, notwithstanding that such service is recognized as sufficient by the statutes or the judicial decisions of the state. St. Clair v. Cox, 106 U. S. 350; Fitzgerald Co. v. Fitzgerald, 137 U. S. 98, 106; Goldey v. Morning News, 156 U. S. 518. See, also, Mexican Central Railway v. Pinkney, 149 U. S. 194. . . . . The present action was brought by a citizen and resident of the state of New Jersey, in a circuit court of the United States held within the state of New York, against a foreign corporation doing business in the latter state. It was for a personal tort committed abroad, such as would have been actionable if committed in the state of New York or elsewhere in this country, and an action for which might be maintained in any circuit court of the United States which acquired jurisdiction of the defendant. Railroad Co. v. Harris, above cited (12 Wall. 65); Dennick v. Railroad Co., 103 U. S. 11; Huntington v. Attrill, 146 U. S. 657, 670, 675; Stewart v. Baltimore & Ohio Railroad, 168 U. S. 445. The summons was duly served upon the regularly appointed agents of the corporation in New York. In re Hohorst above cited. The action was within the general jurisdiction conferred by Congress upon the circuit courts of the United

States. The fact that the legislature of the state of New York has not seen fit to authorize like suits to be brought in its own courts by citizens and residents of other states cannot deprive such citizens of their right to invoke the jurisdiction of the national courts under the constitution and laws of the United States."

Similarly, H. N. Reeves v. Southern Ry. Co., 121 Va. 561; Sullivan v. Sullivan Timber Co., 103 Ala. 371; Aldrich v. Anchor Coal & Development Co., 24 Or. 32; Granite State Provident Assn. v. Lloyd, 145 Ill. 620; Harding v. American Glucose Co., 182 Ill. 551; State v. U. S. Mut. Acc. Assn., 67 Wis. 624; Ins. Co. v. Gillett, 54 Md. 212.

§ 235. The question then arises, What constitutes "doing business"?

This is a question of fact, dependent partly on acts and partly on intention, as is the similar question of domicile. As was said by the circuit court of appeals for the sixth circuit, in Oakland Sugar Mill Co. v. Wolfe Co., 118 Fed. 239, it is properly one for determination by a jury. The test to be gathered from the authorities is whether a single act or more has been performed by the corporation through its agent or agents within the state of the kind characteristic of the business objects of the corporation and with apparent intent to continue such performance.

In Neyens v. Worthington, 150 Mich. 580, 114 N. W. 404, it was held that a contract made in Michigan by an Illinois corporation appointing an agent for the continued sale of its products for the period of fifteen years was doing business within the state, McAlvay, C. J., saying:

"There is a conflict in the authorities as to what, under these regulating statutes, constitutes 'carrying on its business' in a state by an unauthorized foreign corporation. The weight of authority holds that a single sale of goods, or a single business transaction by such corporation, cannot be held to amount to carrying on business where there is no purpose to do any further business. 19 Cyc. Law & Proc., p. 1268, and cases cited. The case at bar is distinguishable from either of the classes of cases above mentioned. This agreement by its terms was an invasion of this state by a foreign corporation, not simply to make sales of products manufac-

tured and delivered in a foreign state, nor was it a single act of business without intent or purpose to do any other business; but it was for the express purpose of extending and establishing its business permanently within the state. The agreement was made within the state, with a citizen of the state, to be executed by him wholly within its territory. It covered a term of fifteen years, and for the rights granted under it a large consideration was received by the company. This transaction will, in our opinion, bear no other construction than that this corporation was carrying on its business within this state with the express intention of continuing so to do. None of the authorities question the proposition that, if the acts of a foreign corporation, in coming within a state, amount to carrying on business, such corporation must conform with the requirements of the statute, or be subjected to its penalties and restrictions. The cases cited by plaintiff as sustaining his contention that this was not 'carrying on business' recognize the doctrine that, where an act of business is transacted by a foreign corporation within a state with the intention to continue to transact its business in such state, the corporation is carrying on its business within such state. Cooper Mfg. Co. v. Ferguson, 113 U. S. 735, 28 L. Ed. 1139, 5 Sup. Ct. Rep. 739; Commercial Bank v. Sherman, 28 Or. 576, 52 Am. St. Rep. 811, 43 Pac. 658; Florsheim Bros. Dry Goods Co. v. Lester, 60 Ark. 120, 27 L. R. A. 505, 46 Am. St. Rep. 162, 29 S. W. 34. See, also, People v. Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155. In Vaughn Mach. Co. v. Lighthouse, 64 App. Div. 142, 71 N. Y. Supp. 801, the court said: 'The crucial test in doing business within the meaning of this statute is not an isolated transaction within the state, or the transshipment of goods from the home office pursuant to orders taken by drummers within the state, but it is the establishment of an agency or branch office within our state limits.' "

§ 236. In Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, it was held that where an Illinois corporation contracted in Wisconsin with a Wisconsin corporation to erect a factory for the latter in Wisconsin, and proceeded to act under the contract, it was doing business in Wisconsin. Holmes, J., said:

"According to the undisputed testimony of the plaintiff's vice-president, who executed the contract, the instrument was signed in Wisconsin, and at all events, if it was executed with

a view to the carrying on of business in that state by the plaintiff, the law of Wisconsin must be applied. London Assurance v. Companhia de Moagens do Barreiro, 167 U. S. 149, 160, 161; Graves v. Johnson, 156 Massachusetts, 211.''

In People ex rel. Southern Cotton Oil Co. v. Wemple, 131 N. Y. 64, it was held that a New Jersey corporation which had a sales agency in New York, and for a period of three years sold about one-third of its product in New York, was doing business in New York.

Similarly, United States Rubber Co. v. Butler & Shoe Co., 132 Fed. 398; Farmers' Loan & Trust Co. v. Lake etc. R. Co., 173 Ill. 439; John Deere Plow Co. v. Wyland, 69 Kan. 255. So likewise is the investment of capital and management of property in the state doing business therein. People v. Miller, 181 N. Y. 328; People's Building etc. Assn. v. Markley, 27 Ind. App. 128, 60 N. E. 1013; Groel v. United Electric Co., 69 N. J. Eq. 397.

§ 237. The doing of a single act or making a single contract may, under the particular statute or the circumstances of the particular case, be doing business in the state (State v. Bristol Savings Bank, 108 Ala. 3, 18 South. 533; Pennsylvania Co. v. Bauerle, 143 Ill. 459, 33 N. E. 166; Lamb v. Lamb, 14 Fed. Cas. 8018; International Text-book Co. v. Lynch, 81 Vt. 101, 69 Atl. 541); or it may not be doing business, as the case may be. (Sigel Campion Livestock etc. Co. v. Haston, 68 Kan. 749, 75 Pac. 1028; Florsheim Bros. Dry Goods Co. v. Lester, 60 Ark. 120, 29 S. W. 34; Colorado Iron Works v. Sierra Grande Min. Co., 15 Colo. 499, 25 Pac. 325; Delaware & Canal Co. v. Mahlenbrock, 63 N. J. L. 281, 43 Atl. 978; Commercial Bank v. Sherman, 28 Or. 573, 43 Pac. 658; Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680; Chicago Title etc. Co. v. Bashford, 120 Wis. 281, 97 N. W. 940; Ware Cattle Co. v. Anderson, 107 Iowa, 231, 77 N. W. 1026; Empire Milling etc. Co. v. Tombstone etc. Min. Co., 100 Fed. 910; Kilgore v. Smith, 122 Pa. 48, 15 Atl. 698; Meddis v. Kenney, 176 Mo. 200, 75 S. W. 633; Holder v. Aultman & Co., 169 U. S. 81; Bamberger v. Schoolfield, 160 U. S. 149; McNaughton Co. v. McGirl, 20 Mont. 124, 49 Pac. 651.) On the other hand, in-

terstate commerce transactions, be they single or continuous, amounting in substance to the sale of goods by corporations outside the state for shipment into and delivery within the state, are not doing business in the state. (Morgan v. White, 101 Ind. 413; Boardman v. McClure Co., 123 Fed. 614; Ware v. Hamilton Brown Shoe Co., 92 Ala. 145, 9 South. 136; John Spry Lumber Co. v. Chappell, 184 Ill. 539, 56 N. E. 794; Wilcox Cordage etc. Co. v. Mosher, 114 Mich. 64, 72 N. W. 117; North Wisconsin Cattle Co. v. Oregon etc. R. Co., 105 Minn. 198, 117 N. W. 391; Wolff Dryer Co. v. Bigler, 192 Pa. 466, 43 Atl. 1092; Rich v. Chicago etc. R. Co., 34 Wash. 14, 74 Pac. 1008; Green v. Chicago etc. R. Co., 205 U. S. 530; Grace Co. v. Henry Martin etc. Co., 174 Fed. 131.)

EMINENT DOMAIN.

CHAPTER XII.

PUBLIC USE.

§ 250. Every sovereign state has in the last analysis the absolute dominion and disposal of its citizens and their property. It is the source alike of all legal rights and of all legal duties and obligations. Subject only to self-imposed limitations, it may create and destroy rights and impose or relax and annul duties and obligations.

With us, ultimate sovereignty is in the people, delegated to the federal and state governments, subject to certain limitations, and among the sovereign functions recognized as pertaining to our federal and state governments is the right or power of eminent domain. These words, "eminent domain," are used to denote the sovereign power to appropriate property to such purposes and objects as may be determined by government to require its use.

This right and power in the government termed "eminent domain" is subjected to the constitutional limitations (1) that no person shall be deprived of his life, liberty or property without due process of law; (2) that private property shall not be taken for public use without just compensation.

These limitations contained in the federal constitution are controlling to the extent that no state constitution can lessen their force, whatever more stringent limitation may be added.

It is generally agreed that the institution of private property being recognized by the constitution, by virtue, therefore, of this recognition, and of the express constitutional limitations above mentioned, private property may not be taken for private use, irrespective of any question of compensation, i. e., that private property may not, by legislative or other sovereign fiat, be taken from one private individual and

vested in another private individual for the private use of that or any person or persons.

§ 251. The scope, therefore, of the exercise of the right and power of eminent domain resolves itself into the question, What is a taking of private property by due process of law for public use upon just compensation made?

Various rules have been tentatively established by the state courts, but little more is attempted here than to illustrate the standard set by the supreme court of the United States, to which all must conform.

First to be determined is the question, What is a public use? Upon this question is perhaps the widest variance of authority, some confining the application of the term to the more determinate and less elastic class of cases similar to the ancient trinoda necessitas, i. e., to cases where the public, as such, may continually participate in the use, e. g., a bridge, a railroad, or other similar public utility, while other authorities apply a different test, namely, whether the intended use be one requisite to enhance the public welfare. This latter test is much less easy of determination and application, but, by reason of its very elasticity, is better conformable to the changing conditions of a growing, expanding and progressive people.

This latter has been approved by the supreme court of the United States as the standard to be applied, and in a comparatively recent case it was held to be a question essentially in the last resort for judicial determination, and whether, upon all the facts and circumstances surrounding the particular case, the use for which the property is proposed to be taken is shown to be a public use.

§ 252. In Cole v. La Grange, 113 U. S. 1, in holding that a state legislature could not authorize a city to issue bonds by way of donation to a private manufacturing company, Gray, J., said:

"The general grant of legislative power in the constitution of a state does not enable the legislature, in the exercise either of the right of eminent domain or of the right of taxa-

tion, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

§ 253. In West River Bridge Co. v. Dix, 6 How. 507, it was held that a charter of a corporation is subject to the right of eminent domain in the state, and that a bridge held by an incorporated company under a charter from a state may be condemned and taken as part of a public road under the laws of the state, without impairing the obligation of the contract of the charter. Daniel, J., in the opinion of the court, said:

"No state, it is declared, shall pass a law impairing the obligation of contracts; yet with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power denominated the eminent domain of the state is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise.

"The constitution of the United States, although adopted by the sovereign states of this Union and proclaimed in its own language to be the supreme law for their government, can, by no rational interpretation, be brought to conflict with this attribute in the states. There is no express delegation of it by the constitution, and it would imply an incredible fatuity in the states to ascribe to them the intention to relinquish the power of self-government and self-preservation. A correct view of this matter must demonstrate, moreover, that the right of eminent domain in government in no wise interferes with the inviolability of contracts; that the most sancti-

monious regard for the one is perfectly consistent with the possession and exercise of the other.

§ 254. "Under every established government, the tenure of property is derived, mediately or immediately, from the sovereign power of the political body, organized in such mode or exerted in such way as the community or state may have thought proper to ordain. It can rest on no other foundation, can have no other guaranty. It is owing to these characteristics only, in the original nature of tenure, that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis, the law of property would be simply the law of force. Now, it is undeniable that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the state, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfill it. But into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions, inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract effected by it, but recognizes its obligation in the fullest extent, claiming only the fulfillment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the constitution can scarcely, by the greatest violence of construction, be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof. It, then, being clear that the power in question not being within the purview of the restriction imposed by the tenth section of

the first article of the constitution, it remains with the states, to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed commensurate with public necessity. So long as they shall steer clear of the single predicament denounced by the constitution, shall avoid interference with the obligation of contracts, the wisdom, the modes, the policy, the hardship of any exertion of this power are subjects not within the proper cognizance of this court. This is in truth purely a question of power; and conceding the power to reside in the state government, this concession would seem to close the door upon all further controversy in connection with it. The instances of the exertion of this power, in some mode or other, from the very foundation of civil government, have been so numerous and familiar, that it seems somewhat strange at this day to raise a doubt or question concerning it. In fact, the whole policy of the country relative to roads, mills, bridges and canals rests upon this single power, under which lands have been always condemned, and without the exertion of this power, not one of the improvements just mentioned could be constructed. In our country it is believed that the power was never, or, at any rate, rarely, questioned, until the opinion seems to have obtained that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest upon until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For as a question of the power to appropriate to public uses the property of private persons, resting upon the ordinary foundations of private right, there would seem to be room neither for doubt nor difficulty. A distinction has been attempted in argument between the power of a government to appropriate for public uses property which is corporeal or may be said to be in being and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that in truth avoids the true legal or constitutional question in these causes, namely, that of the right in private persons, in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher or render it more sacred than other property. A franchise is property, and nothing more; it is incorporeal property, and is so defined by Justice Blackstone when treating in his second

volume, chapter 3, page 20, of the Rights of Things. It is its character of property only which imparts to it value and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment. Vide, Bl. Com., vol. III, ch. 16, p. 236, as to injuries to this description of private property and the remedies given for redressing them. A franchise, therefore, to erect a bridge or construct a road to keep a ferry and to collect tolls upon them, granted by the authority of the state, we regard as occupying the same position, with respect to the paramount power and duty of the state to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the state, and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the constitution, and no violation of a contract. The power of a state, in the exercise of eminent domain, to extinguish immediately a franchise it had granted appears never to have been directly brought here for adjudication, and consequently has not been heretofore formally propounded from this court; but in England, this power, to the fullest extent, was recognized in the case of the Governor and Company of the Cast Plate Manufacturers v. Meredith, 4 T. R. 794, and Lord Kenyon, especially in that case, founded solely upon this power the entire policy and authority of all the road and canal laws of the kingdom."

§ 255. And Woodbury, J., said:

"I take the liberty to say, then, as to the cardinal principle involved in this case, that in my opinion all the property in a state is derived from, or protected by, its government, and hence is held subject to its wants in taxation, and to certain important public uses, both in war and peace. Vattel, B. 1, ch. 20, § 244; 2 Kent Com. 270; 37 Am. Jur. 121; 1 Bl. Com. 139; 3 Wils. 303; 3 Story Const. 661; 3 Dall. 95. Some ground this public right on sovereignty. 2 Kent Com. 339; Grotius, B. 1, ch. 1, § 6. Some on necessity. 2 Johns. (N. Y.) Ch. 162; 11 Wend. (N. Y.) 51; 14 id. 56; 1 Rice (S. C.), 383; Vanhorne's Lessee v. Dorrance, 2 Dall. 310; Dyer v. Tuscaloosa Bridge, 2 Port. (Ala.) 303; Harding v. Goodlett, 3 Yerg. (Tenn.) 53. Some on implied compact. Raleigh & Gaston Railroad Co. v. Davis, 2 Dev. & B. (N. C.) 456; 2 Bay 36, in S. Car.; 3 Yerg. (Tenn.) 53.

"When a charter is granted after laws exist to condemn property when needed for public purposes, others might well rest such a right on the hypothesis that such laws are virtually

a part and condition of the grant itself, as much as if inscribed in it totidem verbis. Towne v. Smith, 1 Woodb. & M. 134; 2 How. 608, 617; 1 id. 311; 3 Story Const., §§ 1377, 1378, quaere.

"But however derived, this eminent domain exists in all governments, and is distinguished from the public domain, as that consists of public lands, buildings, etc., owned in trust exclusively and entirely by the government (3 Kent. Com. 339; Memphis v. Overton, 3 Yerg. (Tenn.) 389); while this consists only in the right to use the property of others, when needed for certain public purposes. Without now going further into the reasons or extent of it, and under whatever name it is most appropriately described, I concur in the views of the court, that it still remains in each state of the Union in a case like the present, having never been granted to the general government so far as respects the public highways of a state, and that it extends to taking for public use for a road any property in the state suitable and necessary for it. Tuckahoe Canal Case, 11 Leigh (Va.), 75; 11 Pet. 560; 20 Johns. (N. Y.) 724; 3 Paige (N. Y.), 45; 7 Pick. (Mass.) 459."

§ 256. In Kohl et al. v. United States, 91 U. S. 367, in holding that the right of eminent domain existed in the United States government to condemn a parcel of land in Cincinnati for a postoffice, and that the circuit court of the United States had jurisdiction of the condemnation proceeding, Strong, J., said:

"No one doubts the existence in the state governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vattel, c. 20, 34; Bynk., lib. 2, c. 15; Kent's Com. 338, 340; Cooley on Const. Lim. 584 et seq. But it is no more necessary for the exercise of the powers of a state government than it is for the exercise of the conceded powers of the federal government. That government is as sovereign within its sphere as the states are within theirs. True, its sphere is limited. Certain subjects only are com-

mitted to it; but its power over those subjects is as full and complete as is the power of the states over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

"But if the right of eminent domain exists in the federal government, it is a right which may be exercised within the states, so far as is necessary to the enjoyment of the powers conferred upon it by the constitution. In Ableman v. Booth, 21 How. 523, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties, within the same territorial space, each of them restricted in its powers, and each within its sphere of action prescribed by the constitution of the United States independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish postoffices and to create courts within the states was conferred upon the federal government, included in it was authority to obtain sites for such offices and for courthouses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power ought not to be questioned. The constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation."

§ 257. And respecting the jurisdiction of the circuit courts:

"When, in the eleventh section of the Judiciary Act of 1789, jurisdiction of suits of a civil nature at common law or in equity was given to the circuit courts, it was intended to embrace not merely suits which the common law recognized as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined as distinguished from rights in equity, as well as suits in admiralty. The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That it was not enforced through the agency of a

jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not within the meaning of the statute a suit at common law when initiated in a court. It is an attempt to enforce a legal right. It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature, at least, quasi judicial."

§ 258. In Kaukauna Water Power Co. v. Green Bay etc. Canal, 142 U. S. 254, it was held that while the erection of a dam for furnishing water for manufacturing purposes solely was not a public use, the erection of a dam to improve navigation of a river was a public use, and any excess of water over that needed for the public use might be sold for manufacturing purposes. Brown, J., said:

"The improvement of the navigation of a river is a public purpose, and the sequestration or appropriation of land or other property, therefore, for such purpose is doubtless a proper exercise of the authority of the state under its power of eminent domain. Upon the other hand, it is probably true that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water-power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain."

§ 259. Upon the question of compensation for property taken, in holding that complainant had waived its rights for damages by not complying with the act while in force, Brown, J., said:

"Where a statute for the condemnation of lands provides a definite and complete remedy for obtaining compensation, this remedy is exclusive; the common-law remedy or proceeding is superseded by the statute, and the owner must pursue the course pointed out by it. Mills on Eminent Domain, secs. 87, 88. It is true that, if the statutory remedy be incomplete or imperfect, the owner is not thereby debarred from his common-law remedy, and may recover his damages in an action of trespass or ejectment."

§ 260. In Fallbrook Irrigation District v. Bradley, 164 U. S. 112, it was held that taking land for irrigation by way of enforcing an assessment under an act establishing an irrigation district of arid lands was not taking property without due process of law, irrigation of such lands being a public use under the circumstances of the case at bar. Peckham, J., said:

"It has often been said to be extremely difficult to give any sufficient definition of what is embraced within the phrase 'due process of law,' as used in the constitutional amendment under discussion. None will be attempted here. It was stated by Mr. Justice Miller, in Davidson v. New Orleans, 96 U. S. 97, 104, that there was 'abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him and of the merits of the legislation on which such a decision may be founded.' Of course, no such jurisdiction exists or is claimed to exist by the parties here. It is at the same time most difficult to set certain and clear bounds to the right of this court and consequently to its duty to review questions arising under state legislation with reference to this amendment as to due process of law.

"It never was intended that the court should, as the effect of the amendment, be transformed into a court of appeal, where all decisions of state courts involving merely questions of general justice and equitable considerations in the taking of property should be submitted to this court for its determination. The final jurisdiction of the courts of the states would thereby be enormously reduced and a corresponding increase in the jurisdiction of this court would result, and it would be a great misfortune in each case. Mobile County v. Kimball, 102 U. S. 691, 704; Missouri Pacific Railway v. Humes, 115 U. S. 512, 520. We reiterate the statement made in Davidson v. New Orleans, supra, that 'whenever by the laws of the state or by state authority a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the change thus imposed in the ordinary courts of justice, with such notice to the per-

son or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to the other objections.'

§ 261. "Coming to a review of these various objections, we think the first, that the water is not for a public use, is not well founded. The question, what constitutes a public use, has been before the courts of many of the states, and their decisions have not been harmonious, the inclination of some of these courts being toward a narrower and more limited definition of such use than those of others.

"There is no specific prohibition in the federal constitution which acts upon the states in regard to their taking private property for any but a public use. The fifth amendment, which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the federal government, as has many times been decided. Spies v. Illinois, 123 U. S. 131; Thorington v. Montgomery, 147 U. S. 490. In the fourteenth amendment the provision regarding the taking of private property is omitted, and the prohibition against the state is confined to its depriving any person of life, liberty or property without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the state instead of the federal government.

"Is this assessment, for the nonpayment of which the land of the plaintiff was to be sold, levied for a public purpose? The question has, in substance, been answered in the affirmative by the people of California, and by the legislative and judicial branches of the state government. The people of the state adopted a constitution, which contains this provision:

"'*Water and Water Rights.*—Sec. 1. The use of all water now appropriated or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use and subject to the regulation and control of the state in the manner to be prescribed by law.' Constitution of California, art. 14.

"The latter part of § 12 of the act now under consideration, as amended in March, 1891, reads as follows:

" 'The use of all water required for the irrigation of the lands of any district formed under the provisions of this act together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this act is hereby declared to be a public use, subject to the regulation and control of the state, in the manner prescribed by law.'

§ 262. "The supreme court of California has held in a number of cases that the irrigation act is in accordance with the state constitution, and that it does not deprive the land owners of any property without due process of law; that the use of the water for irrigating purposes under the provisions of the act is a public use, and the corporations organized by virtue of the act for the purpose of irrigation are public municipal corporations, organized for the promotion of the prosperity and welfare of the people. Turlock Irrigation District v. Williams, 76 California, 360; Central Irrigation District v. De Lappe, 79 California, 351; In re Madera Irrigation District, 92 California, 296. We do not assume that these various statements, constitutional and legislative, together with the decisions of the state court, are conclusive and binding upon this court upon the question as to what is due process of law, and, as incident thereto, what is a public use. As here presented, these are questions which also arise under the federal constitution, and we must decide them in accordance with our views of constitutional law. It is obvious, however, that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned.

"To provide for the irrigation of lands in states where there is no color of necessity therefor within any fair meaning of the term, and simply for the purpose of gratifying the taste of the owner, or his desire to enter upon the cultivation of an entirely new kind of crop, not necessary for the purpose of rendering the ordinary cultivation of the land reasonably remunerative, might be regarded by courts as an improper exercise of legislative will, and the use might not be held to be public in any constitutional sense, no matter how many owners were interested in the scheme. On the other hand, in a state like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded

as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. The people of California and the members of her legislature must, in the nature of things, be more familiar with the facts and circumstances which surround the subject and with the necessities and the occasion for the irrigation of the lands than can anyone be who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own state. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that state on this question.

§ 263. "Viewing the subject for ourselves and in the light of these considerations, we have very little difficulty in coming to the same conclusion reached by the courts of California.

"The use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect. In general, the water to be used must be carried for some distance and over or through private property which cannot be taken in invitum if the use to which it is to be put be not public, and if there be no power to take property by condemnation, it may be impossible to acquire it at all. The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of the eminent domain or by that of taxation. Cole v. La Grange, 113 U. S. 1. A private company or corporation without the power to acquire the land in invitum would be of no real benefit, and, at any rate, the cost of the undertaking would be so greatly enhanced by the knowledge that the land must be acquired by purchase, that it would be practically impossible to build the works or obtain the water. Individual enterprise would be equally ineffectual; no one owner would find it possible to construct and maintain waterworks and canals any better than private corporations or companies; and unless they had the power of eminent domain, they could accomplish nothing. If that power could be conferred upon them, it could only be upon the ground that the property they took was to be taken for a public purpose.

"While the consideration that the work of irrigation must be abandoned if the use of the water may not be held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact is in this case a most important consideration. Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the state in material wealth and prosperity. To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose, and a matter of public interest not confined to the land owners or even to any one section of the state. The fact that the use of the water is limited to the land owner is not, therefore, a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. All land owners in the district have the right to a proportionate share of the water, and no one land owner is favored above his fellow in his right to the use of the water. It is not necessary, in order that the use should be public, that every resident in the district should have the right to the use of the water. The water is not used for general domestic or drinking purposes, and it is plain from the scheme of the act that the water is intended for the use of those who will have occasion to use it on their lands. Nevertheless, if it should so happen that at any particular time the land owner should have more water than he wanted to use on his land, he has the right to sell or assign the surplus or the whole of the water as he may choose.

§ 264. "The method of the distribution of the water for irrigation purposes, provided for in section 11 of the act, is criticised as amounting to a distribution to individuals and not to lands, and on that account it is claimed that the use for irrigation may not be achieved, and therefore the only purpose which could render the use a public one may not exist. This claim we consider not well founded in the language and true construction of the act. It is plain that some method for apportioning the use of the water to the various lands to be benefited must be employed, and what better plan than to say that it shall be apportioned ratably to each land owner upon the basis which the last assessment of such owner for district purposes within the district bears to the whole sum assessed upon the district? Such an apportionment, when fol-

lowed by the right to assign the whole or any portion of the waters apportioned to the land owner, operates with as near an approach to justice and equality as can be hoped for in such matters, and does not alter the use from a public to a private one. This right of assignment may be availed of also by the owner of any lands which, in his judgment, would not be benefited by irrigation, although the board of supervisors may have otherwise decided. We think it clearly appears that all who by reason of their ownership of or connection with any portion of the lands would have occasion to use the water, would in truth have the opportunity to use it upon the same terms as all others similarly situated. In this way the use, so far as this point is concerned, is public, because all persons have the right to use the water under the same circumstances. This is sufficient. . . . .

§ 265. "It is insisted that the basis of the assessment upon the lands benefited, for the cost of the construction of the works, is not in accordance with, and in proportion to, the benefits conferred by the improvement, and therefore there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law. Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation. Whatever objections may be urged to this kind of an assessment, as being in violation of the state constitution, yet as the state court has held them to be without force, we follow its judgment in that case, and our attention must be directed to the question whether any violation of the federal constitution is shown in such an assessment. Can an ad valorem assessment on the land benefited, or, in other words, can such an assessment as is provided for in sections 18, 20, 21 and 22 of the act, be legally levied in such a case as this? Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has

been legally found, can it be that the adoption of an ad valorem method of assessing the lands is to be held a violation of the federal constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received which is open to the discretion of the state legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law. . . . . An objection is also urged that it is delegating to others a legislative right, that of the incorporating of public corporations, inasmuch as the act vests in the supervisors and the people the right to say whether such a corporation shall be created, and it is said that the legislature cannot so delegate its power, and that any act performed by such a corporation by means of which the property of the citizen is taken from him, either by the right of eminent domain or by assessment, results in taking such property without due process of law.

"We do not think there is any validity to the argument. The legislature delegates no power. It enacts conditions, upon the performance of which the corporation shall be regarded as organized with the powers mentioned and described in the act."

§ 266. In support of the rule that public use means purposes promotive and productive of public benefit, the following cases are noted: Olmstead v. Camp, 33 Conn. 532; Beekman v. R. Co., 3 Paige (N. Y.), 45; Seeley v. Sebastian, 4 Or. 25; Hand Gold Mining Co. v. Parker, 59 Ga. 419; Nash v. Clark, 27 Utah, 158, 75 Pac. 371, 198 U. S. 361; Strickley v. Mining Co., 28 Utah, 215, 78 Pac. 296, 200 U. S. 527; Talbot v. Hudson, 16 Gray, 417; Pittsburgh v. Scott, 1 Pa. 309, 314; Jacobs v. Clearview Co., 220 Pa. 388.

The following decisions, on the other hand, are strongly to the effect that the use must involve use by the public to be a public use: Sholl v. German Coal Co., 118 Ill. 427; Matter of Eureka etc. Co., 96 N. Y. 42; Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681; State v. White River Power Co., 39 Wash. 648, 82 Pac. 150; Varner v. Martin, 21 W. Va. 534; Matter of Split Rock Cable R. R. Co., 128 N. Y. 408,

28 N. E. 506; Sisson v. Board, 128 Iowa, 442, 104 N. W. 454; Arnsperger v. Crawford, 101 Md. 247; Berrien Co. v. Judge, 133 Mich. 48, 94 N. W. 379; Minn. Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405; Matter of Tuthill, 163 N. Y. 133, 57 N. E. 303; Cozard v. Kanawha Hardwood Co., 139 N. C. 283, 51 S. E. 932; State v. Superior Court, 42 Wash. 660, 85 Pac. 666.

CHAPTER XIII.

TAKING OF PRIVATE PROPERTY.

§ 270. Private property includes all rights appropriated and owned by individual persons, natural and artificial, to the exclusion of others. Such private rights pertaining to land are termed "real property"; such private rights not pertaining to land are termed "personal property." Real property rights, often classed as corporeal and incorporeal, may perhaps, for some purposes, be more accurately and clearly classed as possessory and nonpossessory; possessory including all rights of immediate or future possession, e. g., estates at will, or for years or for life or in fee, and as well reversions, remainders, executory devises and all future interests; nonpossessory rights of real property including easements, commons and appurtenances of every kind in and upon lands of others or in any particular lands, irrespective of the right of possession.

So, likewise, personal property rights may be classed as possessory, including all rights of immediate or future possession of particular chattels or chattel interests, and nonpossessory, arising out of grant or contract, without regard to particular chattels, as, e. g., franchises, annuities, negotiable instruments, and the like.

The appropriation or destruction for public purposes or objects of any of these rights under the power of eminent domain constitutes a taking of private property, for which compensation must be made.

Legislation, however, regulating matters of public import, such as the navigability of a river or a health statute under the police power, may indirectly damage or lessen the value of such rights, and still not constitute a taking of private property for which compensation must be made.

Again, the legislature may, under its general law-making power, regulate the uses to which persons may put their property, in proper cases requiring compensation to be made for

damage caused; for example, authorizing riparian owners to build dams upon their land, causing water to overflow others' property and requiring damages to be assessed and paid therefor, but this is rather a property regulation than a taking of property for public use.

So, too, the exercise of the power of taxation, while it is a taking of private property for public use, is not a taking in the sense of the word employed in connection with the power of eminent domain, for in taxation the taking is general, and the benefits and protection of life and property afforded by government are recognized as sufficient compensation, but the taking of property under the power of eminent domain is not a general, but a particular, taking, for which, therefore, special compensation must be made.

§ 271. In Pumpelly v. Green Bay Company, 13 Wall. 166, it was held that a dam causing water to overflow plaintiff's land was a *taking* of property that must be compensated. Miller, J., said:

"In the case of Gardner v. Newburgh (2 Johnson's Chan. N. Y. 162), Chancellor Kent granted an injunction to prevent the trustees of Newburg from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the legislature which authorized it had made no provision for compensating the plaintiff for the injury thus done to his land. And he did this though there was no provision in the constitution of New York such as we have mentioned, and though he recognized that the water was taken for a public use. After citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. And he adds that the principles and practice of the English government are equally explicit on this point. It will be seen in this case that it was the diversion of the water from the plaintiff's land which was considered as taking private property for public use, but which, under the argument of defendants' counsel, would, like overflowing the land, be called only a consequential injury.

"If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was

understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the constitution it would become an instrument of oppression rather than protection to individual rights.

"But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on Watercourses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken. . . . .

"We are not unaware of the numerous cases in the state courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one, in its proper application to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other state constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those states. But we are of the opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and in some cases beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle."

§ 272. In N. Y. Elevated R. R. v. Fifth Nat. Bank, 135 U. S. 432, it was held that owners of property abutting a street on which an elevated railroad was constructed had an easement of way, light and air, for deprivation of which they were entitled to compensation. Gray, J., said:

"The owners of lands abutting on a street in the city of New York have an easement of way, and of light and air over it; and through a bill in equity for an injunction may recover of the elevated railroad company full compensation for the permanent injury to this easement."

In Spokane Falls & N. R. Co. v. Ziegler, 167 U. S. 65, it was held that a settler or pre-emption claimant had a right

of property, for which he was entitled to compensation on the land being seized by a railroad company. Shiras, J., said:

"Passing from the question of jurisdiction, we come to the contention of the plaintiff in error that Ziegler, as a mere settler upon the lands of the United States, although with an intention to obtain title to the same under the pre-emption laws, did not have such a vested interest in the land as would avail against the railway company in asserting its right of way conferred by the act of Congress. An answer to this question is furnished by the case of Washington & Idaho Railroad Co. v. Osborn, 160 U. S. 103, where it was held that a railroad company whose road is laid out so as, under the provisions of the act of March 3, 1875, to cross a part of the public lands, cannot take part thereof in the actual possession and occupation of a settler who is entitled to claim a pre-emption right thereto when the proper time shall come, and who has made improvements on the land so occupied by him, without making proper compensation therefor. . . . . And it was held that the right of a settler in possession of unsurveyed lands of the United States, who had made improvements with the intention of procuring a title under the pre-emption laws as soon as the same should be surveyed by the government, was a possessory claim within the meaning of the statute, for which compensation must be made by a railroad company seeking to appropriate a part of it for its tracks."

§ 273. In Railway Co. v. Renwick, 102 U. S. 180, where a riparian owner abutting the Mississippi, a navigable river, had constructed a pier or boom between high and low water mark, it was held that though the state owned the land below high-water mark, and the pier had been constructed without authority and was seemingly subject to removal at the instance of the public, yet it was private property, and the railway company could not cross it or appropriate it without making compensation. Waite, C. J., said:

"The public does not complain, but the railroad company wants the improvements. In the hands of the company they will be just as much a nuisance, so far as the public is concerned, as they can be if kept up by the owner. As between these two parties the improvements are the property of the riparian proprietor, and if the company wants them for its own use, it must make compensation."

Respecting title to tide lands, see Shiveley v. Bowlby, 152 U. S. 1.

§ 274. In Hot Springs R. R. Co. v. Williamson, 136 U. S. 121, in affirming a decision of the supreme court of Arkansas that a railroad company constructing its road in a public street is, under the constitution of Arkansas, liable to abutting owners for consequential damages to their property, Lamar, J., said respecting the decision of the state court:

"It further held that the contention of the plaintiff in error that the act of Congress invested it with an absolute title to the street along which its road was located, and exempted it from any liability for consequential damages resulting to an abutting owner from the laying of its track in a proper and skillful manner, was founded upon cases arising under the familiar constitutional restriction that private property shall not be taken for public use without compensation, which decisions generally turned upon the question, What is a taking within the meaning of such provision? That the constitution of that state of 1878, which provides that 'private property shall not be taken, appropriated or damaged for public use without just compensation,' has changed that rule; that all the decisions rendered under similar constitutional provisions concur in holding that the use of a street by a railroad company as a site for its track, under legislative or municipal authority, when it interferes with the rights of adjoining lot owners to the use of the street as a means of ingress and egress, subjects the railroad company to an action for damages, on account of the diminution of the value of the property caused by such use; and lastly, that even conceding the authority of the town of Hot Springs to pass the ordinance authorizing the company to construct and maintain the railroad embankment track and turntable complained of, it cannot impair the constitutional right of the defendant in error to compensation."

§ 275. In Richmond etc. R. R. Co. v. Louisa R. R. Co., 13 How. 70, in holding that a state legislature, although it had given one company an exclusive right to build a railroad between two points, could authorize a second company to cross the road of the first company without impairing the obligation of contracts, Grier, J., said:

"The grant of a franchise is of no higher order and confers no more sacred title than a grant of land to an individual;

and when the public necessities require it, the one, as well as the other, may be taken for public purposes on making suitable compensation; nor does such an exercise of the right of eminent domain interfere with the inviolability of contracts. See West River Bridge Co. v. Dix, 6 How. 507."

But the legislature will not be presumed to have abandoned the former use for the new one without clear expression of such intention. (Matter of N. Y. etc. R. R. Co., 20 Hun (N. Y.), 201.)

In Greenwood v. Freight Co., 105 U. S. 13, in holding that a legislature having power of repeal could repeal the charter of an old company and authorize a new company to take such of the property and franchises of the old company as are necessary for public use on making due compensation therefor, Miller, J., said:

"That in creating the later corporation, whose object was to fulfill a public use, it could authorize it to take such property of other corporations as might be necessary to that use as well as that of individuals, can hardly admit of question. Section 4 of the act gives this power to the Union company, with reference to the tracks of all street railroads in the city, and provides that in the event of an inability to agree with the owners of these tracks as to compensation, that shall be determined in accordance with the provisions of general laws previously enacted on that subject. To this there can be no valid legal objection. The property of corporations, even including their franchises, when that is necessary, may be taken for public use under the power of eminent domain on making due compensation. West River Bridge Co. v. Dix, 6 How. 507; Central Bridge Corporation v. City of Lowell, 4 Gray (Mass.), 474; Boston Water Power Co. v. Boston & Worcester R. R. Corporation, 23 Pick. (Mass.) 360; Richmond etc. Railroad Co. v. Louisa R. R. Co., 13 How. 71."

§ 276. In Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, where a city had contracted with the water company for water supply for twenty-five years, it was held that the water system was subject to condemnation within the period, and, the statutes so providing, that the assessment of damages by commissioners instead of a jury was no denial of due process of law. Brewer, J., said:

"The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company to public uses. . . . . Neither can it be said that there was not 'due process of law' in these condemnation proceedings. It is not essential that the assessment of damages be made by a jury. Such award may be made by commissioners at least where there is provision for a review of their proceedings in the courts. Central Branch Union Pacific Railroad v. Atchison, Topeka & Santa Fe Railroad, 28 Kansas, 453, 463; Cooley on Const. Lim., 563. And sections 9 and 10 of the act of 1892, under which these proceedings were had, require that the commissioners make and file a report of their proceedings and determination in the supreme court of the county of Kings, and that application must be made to that court for a confirmation of the report; that notice of such application must be given, and that 'upon such application the court may confirm the report, or may set it aside for irregularity, or for error of law in the proceedings before the commissioners, or upon the ground that the award, in part or in whole, is excessive or is insufficient'; and appeal was allowed from the decision of that court to a higher. We do not question the proposition that form is not the only thing essential to due process. We said in the recent case of Chicago, Burlington & Quincy Railroad v. Chicago, 166 U. S. 226, 'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.'

"It may be true, as contended, that as construed by the court of appeals, the determination of the commissioners is conclusive as to the mere value of the property, but there is no denial of due process in making the findings of fact by the triers of fact, whether commissioners or a jury, final as to such facts, and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted by the triers in their appraisal, or other errors in their proceedings."

§ 277. In Holyoke Co. v. Lyman, 15 Wall. 500, in holding that a company authorized by the legislature of Massachusetts to construct a dam across the Connecticut was not, even if it could have been, exempted from constructing fishways, Clifford, J., said:

"Public rights, in all jurisdictions, are subject to legislative control, and it is settled law in Massachusetts, and has been for a century and a half, including her colonial history, that the right of fishery in such rivers as the Connecticut and Merrimac, even above the point where they are navigable for boats or rafts, and the right to erect and maintain dams to create water-power for mill purposes, are public rights, and that the owners of such rights are bound by such reasonable regulations as the state may make and ordain for their protection and enjoyment. . . . .

"Such a charter may doubtless be granted to build a dam across a river whose whole course is within the state granting the franchise, with a provision exempting the corporation from all obligation to construct such fishway for the free passage of the fish, as the enterprise of erecting a dam to create power to operate mills is so far public in its nature that it is competent for the legislature to exercise the power of eminent domain to accomplish the purpose, if suitable provision is made to compensate the owners of the property or rights condemned under that power, but it may be more doubtful whether the legislature of a state can make a contract with such a corporation authorizing them to construct a dam across a river flowing through two or more states which shall permanently exempt the grantees from all such obligation and destroy forever the rights of fishery in the river throughout its whole course from its source to its confluence with tide waters."

§ 278. In Scranton v. Wheeler, 179 U. S. 141, it was held that the erection by authority of Congress of a pier on lands under *navigable* water in front of uplands owned by an individual and cutting off access by the individual was not a taking of private property, and therefore compensation was not necessary, Shiras, Gray and Peckham, Justices, dissenting on the ground that, though the land under navigable water belongs to the state, access by adjacent owner to the navigable water is private property, the taking of which without compensation could not be justified. Harlan, J., in the opinion of the court, said:

"The vital question, therefore, is the one heretofore mentioned, namely, whether the prohibition in the constitution of the United States of the taking of private property for public use without just compensation has any application to the case of an owner of land bordering on a public navigable

river whose access from his land to navigability is permanently lost by reason of the construction of a pier resting on submerged lands away from, but in front of, his upland, and which pier was erected by the United States, not with any intent to impair the rights of riparian owners, but for the purpose only of improving the navigation of such river.

"Undoubtedly, compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the fifth amendment of the constitution; and of course, in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use. What is private property within the meaning of that amendment, or what is a taking of private property for public use, is not always easy to determine. No decision of this court has announced a rule that will embrace every case. But what has been said in some cases involving the general question will assist us in determining whether the present plaintiff has been denied the protection secured by the constitutional provision in question. . . . . But the contention is that compensation must be made for the loss of the plaintiff's access from his upland to navigability incidentally resulting from the occupancy of the submerged lands, even if the construction and maintenance of a pier resting upon them be necessary or valuable in the proper improvement of navigation. We cannot assent to this view. If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the constitution, a *taking* of *private* property for public use, but only a consequential injury to a right which must be enjoyed, as was said in the Yates Case, 10 Wall. 497, 'in due subjection to the rights of the public'—an injury resulting incidentally from the exercise of a governmental power for the benefit of the general public, and from which no duty arises to make or secure compensation to the riparian owner. The riparian owner acquired the right of access to navigability, subject to the contingency that such right might become valueless in consequence of the erection, under competent authority, of structures on the submerged lands in front of his property for the purpose of improving navigation. When erecting the pier in question, the government had no object in view except, in the interest of the public, to improve navigation. It was not designed, arbi-

trarily or capriciously, to destroy rights belonging to any riparian owner. What was done was manifestly necessary to meet the demands of international and interstate commerce. In our opinion, it was not intended that the paramount authority of Congress to improve the navigation of the public navigable waters of the United States should be crippled by compelling the government to make compensation for the injury to a riparian owner's right of access to navigability that might incidentally result from an improvement ordered by Congress. The subject with which Congress dealt was navigation. That which was sought to be accomplished was simply to improve navigation on the waters in question, so as to meet the wants of the vast commerce passing and to pass over them. Consequently, the agents designated to perform the work ordered or authorized by Congress had the right to proceed in all proper ways without taking into account the injury that might possibly or indirectly result from such work to the right of access by riparian owners to navigability."

§ 279. In Gibson v. United States, 166 U. S. 269, it was held that the construction of a dike by the United States in the Ohio river opposite claimant's land, practically destroying her landing, was not a taking entitling claimant to compensation. Fuller, C. J., said:

"All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the federal government by the constitution. South Carolina v. Georgia, 93 U. S. 4; Shively v. Bowlby, 152 U. S. 1; Eldridge v. Trezevant, 160 U. S. 452.

"In South Carolina v. Georgia a proposed improvement of the Savannah River consisted of the practical closing of one channel around an island and the throwing of water into other channels, to the substantial improvement of the harbor of Savannah. This court held that, in view of the general rule, although structures deemed by Congress to be in aid of navigation might in fact be in obstruction of certain methods of navigation of the particular stream, their construction was, nevertheless, within the federal power, and Mr. Justice Strong, delivering the opinion of the court, said:

" 'It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable

waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build lighthouses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage. If, as we have said, the United States have succeeded to the powers and rights of the several states, so far as control over interstate and foreign commerce is concerned, this is not to be doubted. Upon this subject the case of Pennsylvania v. The Wheeling & Belmont Bridge Co., 18 How. 421, is instructive. There it was ruled that the power of Congress to regulate commerce includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed, in the judgment of law, an obstruction of navigation. . . . . The case of The Clinton Bridge, 10 Wall. 454, is in full accord with this decision. It asserts plainly the power of Congress to declare what is and what is not an illegal obstruction in a navigable stream.'

"In Shively v. Bowlby, the leading authorities of the courts of the United States, and of most of the states and of Great Britain, as to the character of the title to submerged land are considered, and the conclusion announced that the title is in each state, with full power in the state legislature to confer it on individuals, subject at all times to the servitude of the federal government for regulation and improvement of navigation. . . . .

§ 280. "The fifth amendment to the constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power.

"The applicable principle is expounded in Transportation Co. v. Chicago, 99 U. S. 635. In that case, plaintiff, being an owner of lands situated at the intersection of La Salle street, in Chicago, with the Chicago River, upon which it had valuable dock and warehouse accommodations, with a numerous line of steamers accustomed to land at that dock, was interrupted in his use thereof by the building of a tunnel under the Chicago River by authority of the state legislature, in accomplishing which work it was necessary to tear up La Salle street, which precluded plaintiff from access to his prop-

erty for a considerable time; also to build a coffer-dam in the Chicago River, which excluded his vessels from access to his docks; and such an injury was held to be damnum absque injuria. This court said, again speaking through Mr. Justice Strong: 'But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542, and notes. The extremest qualification of the doctrine is to be found, perhaps, in Pumpelly v. Green Bay Company, 13 Wall. 166, and in Eaton v. Boston Concord etc. Railroad, 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a "taking." In those cases there was a physical invasion of the real estate of the private owner and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was for a time to render its use more inconvenient.'

"Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes."

§ 281. In United States v. Alexander, 148 U. S. 186, it was held that the owner of a well on land near to but not on the line of the Washington aqueduct, which was destroyed in the construction of that work, was entitled to recover its value from the United States under the provisions of the act of Congress authorizing the work. Shiras, J., said:

" 'There may be,' said this court in the case of Pumpelly v. Green Bay Co., 13 Wall. 166 (syllabus), 'such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the constitution.' The cases which hold that remote and conse-

quential injury to private property by reason of authorized public improvements is not taking such property for public use have many of them gone to the utmost limit of that principle, and some beyond it, though the principle is a sound one in its proper application to many injuries so originating.

"We do not find it necessary to consider on which side of the line thus suggested the present case would fall, for we agree with the court below in thinking that, in the act of Congress, under which this public work was done, are found provisions giving an express remedy for property damaged though not actually taken." (See 188 U. S. 445; 192 U. S. 224; 197 U. S. 577.)

§ 282. In Barney v. Keokuk, 94 U. S. 324, where a riparian owner adjacent to the Mississippi, in Iowa, had dedicated a street above and along high-water mark, it was held that under the laws of Iowa railway tracks might be laid in the streets by public authority, without the consent of the abutting owner and without compensation, and that whether the legal title to land below high-water mark was in the state or in the riparian owner, wharves below the street in the case at bar were incidental to the public use for which the street was dedicated. Bradley, J., said:

"We agree with the court below that the dedication of the streets of Keokuk was a dedication at the common law, and not under the statute; and that in making this dedication the original proprietors of the tract reserved the title to the soil in the street, particularly in Water street; and that this title went with the several lots fronting on the street and extended to the Mississippi river. Whether, under the laws of Iowa, it also attached to the new ground formed by filling in upon the bed of the river is not so clear. It appears to be the settled law of that state that the title of the riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the state. This is also the common law with regard to navigable waters; although in England no waters are deemed navigable except those in which the tide ebbs and flows. In this country, as a general thing, all waters are deemed navigable which are really so; and especially it is true with regard to the Mississippi and its principal branches. The question as to the extent of the riparian title was elaborately discussed in the case of McManus v. Carmichael, 3 Iowa, 1.

The above conclusion was reached, and has always been adhered to in that state. Haight v. The City of Keokuk, 4 Iowa, 199; Tomlin v. Dubuque etc. Railroad Co., 32 id. 106.
. . . .

§ 283. "On the general question as to the rights of the public in a city street, we cannot see any material difference in principle, with regard to the extent of those rights, whether the fee is in the public or in the adjacent land owner or in some third person. In either case, the street is legally open and free for the public passage and for such other public uses as are necessary in a city, and do not prevent its use as a thoroughfare, such as the laying of water-pipes, gas-pipes and the like; and, according to the laws of Iowa (which must be taken to govern the case), it may be occupied by those improved iron ways for public passage which modern skill has devised, and which the advance of general improvement requires. . . . .

"By the construction given to this act (Iowa statute) by the supreme court of the state, railroads, especially when located and constructed under municipal regulation and control, are not regarded as obstructions to a highway in the legal sense, nor as creating, when laid thereon, any injury to the proprietors of the adjacent lands, for which they are entitled to compensation." (14 L. R. A. 381; 43 L. R. A. 554; 17 L. R. A. 474; 24 L. R. A. 721; 2 L. R. A., N. S., 598; 3 L. R. A., N. S., 323; 4 L. R. A., N. S., 202; 7 L. R. A., N. S., 87, 506.)

§ 284. In County of Mobile v. Kimball, 102 U. S. 691, in holding that an issue of county bonds for a river improvement to be ultimately paid by taxation was not a taking of private property for public use within the meaning of the constitution, Field, J., distinguishing taxation, said:

"The issue by the president and commissioners of revenue of Mobile county of bonds for the improvement of the river, bay and harbor of Mobile was not a taking of private property for public use within the meaning of the constitutional clause. It was a loan of the credit of the county for a work public in its character designed to be of general benefit to the state, but more especially and immediately to the county. The expenses of the work were of course to be ultimately defrayed by taxation upon the property and people of the county. But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the constitution. Taxation only exacts a contribution from indi-

viduals of the state or of a particular district, for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure. But when private property is taken for public use, the owner receives full compensation. The taking differs from a sale by him only in that the transfer of title may be compelled, and the amount of compensation be determined by a jury or officers of the government appointed for that purpose. In the one case the party bears only a share of the public burdens; in the other he exchanges his property for its equivalent in money. The two things are essentially different."

§ 285. In Head v. Amoskeag Mfg. Co., 113 U. S. 9, in holding that a statute of a state authorizing any person to erect and maintain on his own land a water-mill and mill dam and across any stream not navigable, paying to the owners of lands flowed damages assessed in a judicial proceeding, is a proper regulation of the property rights of riparian owners, and does not deprive them of their property without due process of law, Gray, J., said:

"It has been held in many cases of high authority that special acts of incorporation, granted by the legislature for the establishment of dams to increase and improve the water-power of rivers and navigable waters for mechanical and manufacturing purposes, are for a public use. Scudder v. Trenton Delaware Falls Co., Saxton, 694, 728, 729; Boston & Roxbury Mill Corporation v. Newman, 12 Pick. 467; Hazen v. Essex Co., 12 Cush. 475; Commonwealth v. Essex Co., 13 Gray, 239, 251, 252; Hankins v. Lawrence, 8 Blackford, 266; Great Falls Manufacturing Co. v. Fernald, 47 N. H. 444. In some of those cases the authority conferred by general mill acts upon any owner of land upon a stream to erect and maintain a mill on his own land and to flow the land of others for manufacturing purposes has been considered as resting on the right of eminent domain, by reason of the advantages inuring to the public from the improvement of water-power and the promotion of manufactures. See, also, Holyoke Co. v. Lyman, 15 Wall. 500, 506, 507; Beekman v. Saratoga & Schenectady Railroad, 3 Paige, 45, 73; Talbot v. Hudson, 16 Gray, 417, 426. And the validity of general mill acts, when directly controverted, has often been upheld upon that ground, confirmed by long usage or prior decisions. Jordan

v. Woodward, 40 Maine, 317; Olmstead v. Camp, 33 Conn. 532; Todd v. Austin, 34 Conn. 78; Venard v. Cross, 8 Kansas, 248; Harding v. Funk, 8 Kansas, 315; Miller v. Troost, 14 Minnesota, 282; Newcomb v. Smith, 1 Chandler, 71; Fisher v. Horican Co., 10 Wisconsin, 351; Babb v. Mackey, 10 Wisconsin, 314; Burnham v. Thompson, 35 Iowa, 421. . . . . The question whether the erection and maintenance of mills for manufacturing purposes under a general mill act, of which any owner of land upon a stream not navigable may avail himself at will, can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use in the constitutional sense, is so important and far-reaching, that it does not become this court to express an opinion upon it when not required for the determination of the rights of the parties before it. We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all and to the public good, is within the constitutional power of the legislature. . . . . The right to the use of running water is publici juris, and common to all the proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him. One reasonable use of the water is the use of the power, inherent in the fall of the stream and the force of the current to drive mills. That power cannot be used without damming up the water and thereby causing it to flow back. If the water thus dammed up by one riparian proprietor spread over the lands of others, they could at common law bring successive actions against him for the injury so done them, or even have the dam abated. Before the mill acts, therefore, it was often impossible for a riparian proprietor to use the water-power at all without the consent of those above him. The purpose of these statutes is to enable any riparian proprietor to erect a mill and use the water-power of the stream, provided he does not interfere with an earlier exercise by another of a like right or with any right of the public; and to substitute, for the common-law remedies of repeated actions for damages and prostration of the dam, a new form of remedy, by which anyone whose land is flowed can have assessed once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury."

§ 286. In Henderson Bridge Co. v. Henderson City, 173 U. S. 592, in upholding the taxation of a railroad bridge by a municipality, Harlan, J., said:

"It is conceivable that taxation may be of such a nature and so burdensome as properly to be characterized a taking of private property for public use without just compensation. But in order to bring taxation imposed by a state or under its authority within the scope of the fourteenth amendment of the national constitution, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation, by its necessary operation, is really spoliation under the guise of exerting the power to tax."

§ 287. In Norwood v. Baker, 172 U. S. 269, it was held that a special assessment against property abutting a street improvement, made on a basis and under a rule excluding inquiry as to benefits received by or accruing to the abutting property, was illegal, as taking property without due process of law to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property. Harlan, J., said:

"The taking of the plaintiff's land for the street was under the power of eminent domain—a power which this court has said was the offspring of political necessity, and inseparable from sovereignty unless denied to it by the fundamental law. Searl v. Lake County School District, 133 U. S. 553. But the assessment of the abutting property for the cost and expense incurred by the village was an exercise of the power of taxation. Except for the provision of the constitution of Ohio above quoted, the state could have authorized benefits to be deducted from the actual value of the land taken, without violating the constitutional injunction that compensation be made for private property taken for public use; for the benefits received could be properly regarded as compensation pro tanto for the property appropriated to public use. But does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street? Undoubtedly, abutting owners may be subjected to special assessments to meet the expenses of opening public

highways in front of their property—such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. Mobile County v. Kimball, 102 U. S. 691, 703, 704; Illinois Central Railroad v. Decatur, 147 U. S. 190, 202; Bauman v. Ross, 167 U. S. 548, 589, and authorities there cited. And according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements. In Williams v. Eggleston, 170 U. S. 304, 311, where the only question, as this court stated, was as to the power of the legislature to cast the burden of a public improvement upon certain towns, which had been judicially determined to be towns benefited by such improvement, it was said: 'Neither can it be doubted that if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement.' But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired if it were established, as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is

made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

§ 288. Brewer, J., dissenting on the ground that the legislative act was itself a determination of the benefits accruing to the area assessed, said:

"The legislative act charging the entire cost of an improvement upon certain described property is a legislative determination that the property described constitutes the area benefited, and also that it is benefited to the extent of such cost. It is unnecessary to inquire how far courts might be justified in interfering in a case in which it appeared that the legislature had attempted to cast the burden of a public improvement on property remote therefrom and obviously in no way benefited thereby, for here the property charged with the burden of the improvement is that abutting upon such improvement, the property prima facie benefited thereby, and the authorities which I have cited declare that it is within the legislative power to determine the area of the property benefited and the extent to which it is benefited. It seems to me strange to suggest that an act of the legislature or an ordinance of a city casting, for instance, the cost of a sewer or sidewalk in a street upon all the abutting property, is invalid unless it provides for a judicial inquiry whether such abutting property is in fact benefited, and to the full cost of the improvement, or whether other property might not also be to some degree benefited, and therefore chargeable with part of the cost."

CHAPTER XIV.

COMPENSATION.

§ 290. The right to compensation for private property taken for public use is fully established under the provisions of the federal and state constitutions. A statute cannot, therefore, validly authorize, directly or indirectly, the taking of private property for public uses except upon compensation first made.

This applies as well to the national government as to the state governments or their agencies. Until compensation duly ascertained is paid to the owner or into court for him, title to the property condemned remains in the private owner, and while a company may enter into possession on the institution of proceedings, if it attempts to retain the land appropriated without making compensation it is but a trespasser. On the payment of compensation duly ascertained title passes.

§ 291. In Monongahela Nav. Co. v. United States, 148 U. S. 312, under an act of Congress authorizing the Secretary of War to purchase or condemn a lock and dam for water improvements, providing that in determining the sum to be paid, the franchise to take tolls should not be estimated, it was held that the franchise could be taken only upon making compensation. Brewer, J., said:

"Upon what does the right of Congress to interfere in the matter rest? Simply upon the power to regulate commerce. This is one of the great powers of the national government—one whose existence and far-reaching extent have been affirmed again and again by this court in its leading opinions, and the power of Congress over such natural highways as navigable streams is confessedly supreme. . . . .

"But like the other powers granted to Congress by the constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject

to the limitations imposed by this fifth amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish postoffices and post roads; but if Congress wishes to take private property upon which to build a post-office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the state, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation, such franchise must be taken into account. Because Congress has power to take the property it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a postoffice is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken, there can be as little doubt. If a man's house must be taken, that must be paid for; and if the property is held and improved under a franchise from the state, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. So coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation. It should be noticed that here there is unquestionably a taking of the property and not a mere destruction. It is not a case in which the government requires the removal of an obstruction. What differences would exist between the two cases, if any, it is unnecessary here to inquire. All that we need consider is the measure of compensation when the government, in the exercise of its sovereign power, takes the property. . . . . It is also suggested that the government does not take this franchise; that it does not need any authority from the state for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all, or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation,

with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the navigation company, which owned it, is deprived of it. The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived. . . . . Our conclusions are that the navigation company rightfully placed this lock and dam in the Monongahela River; that with the ownership of the tangible property legally held in that place, it has a franchise to receive tolls for its use; that such franchise was as much a vested right of property as the ownership of the tangible property; that the right of the national government, under its grant of power to regulate commerce to condemn and appropriate this lock and dam belonging to the navigation company, is subject to the limitations imposed by the fifth amendment; that private property shall not be taken for public uses without just compensation; that just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property; and that the assertion by Congress of its purpose to take the property does not destroy the state franchise."

§ 292. In Sweet v. Rechel, 159 U. S. 380, it was held that a health act of Massachusetts, authorizing the condemnation of lands by the city of Boston, providing for compensation but not requiring it to be paid before the land was taken, was valid and constitutional. Harlan, J., in the opinion said:

"We must, therefore, assume that the act of 1867 had for its real object the protection of the public health and not the mere acquisition of the property in question for purposes of sale or profit, after it had increased in value by reason of the grade being raised. It is not alleged in the pleadings, nor was there any evidence tending to show, that the cost of raising the grade would have been so slight, compared with the real value of the property, that a due regard to the constitution demanded that the owner should have been given opportunity to raise the grade at his own expense and retain the property in its improved condition. On the contrary, it appears that the public health justified prompt action and

the use of such means as could be effectively supplied only by municipal authority acting under legislative sanction. . . . . But the validity of the act of 1867 is questioned on the ground—not suggested in Dingley v. Boston—that it did not provide for compensation to be made to the owners of the property in advance of its actual appropriation by the commonwealth.

"Upon this point the defendant insists that the statute was enacted under the authority to ordain and establish laws and regulations reasonably adapted to secure the good and welfare of the people, and that statutes having such objects in view, which deprive individuals of the control and use of their property, need not make provision at all for compensation to such individuals. . . . . Undoubtedly, the state, without taking the title to itself, may in some appropriate mode, and without compensation to the owner, forbid the use of specified private property where such use would be injurious to the public health. For, as said by Chief Justice Shaw in Commonwealth v. Alger, 7 Cush. 53, 84, 'it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall be so regulated that it be not injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.' 'Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.' This, the court said, was not the power of eminent domain, but rather the police power, 'the power vested in the legislature by the constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same.' When, however, the legislature provides for the actual taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain—a right vital to the existence and safety of the government. But it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner. . . . .

§ 293. "But must compensation be actually made or tendered in advance of such taking or appropriation? Is it not sufficient, in order to meet the requirements of the constitution, if adequate provision be made for compensation? The constitutions of some of the states expressly require that compensation be first made to the owner before the rights of the public can attach. But neither the constitution of Massachusetts nor the constitution of the United States contains any such provision. The former only requires that the owner 'shall receive a reasonable compensation'; the latter that private property shall not be taken for public use 'without just compensation.' Reasonable compensation and just compensation mean the same thing.

"In Haverhill Bridge Proprietors v. Essex County Commissioners, 103 Mass. 120, 124, the court said: 'The duty of paying an adequate compensation for private property taken is inseparable from the exercise of the right of eminent domain. The act granting the power must provide for compensation and a ready means of ascertaining the amount. Payment need not precede the seizure; but the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay.'

"A leading case upon this point is Connecticut River Railroad v. Franklin County Commissioners, 127 Mass. 50, 52, 54, 55, 56. That case arose under a statute of Massachusetts authorizing the manager of a railroad owned by the commonwealth to take land for a passenger station to be used by that and other railroads, and providing no other mode of compensation to the owner than that the land should be paid for out of the earnings of the railroad. The statute was held to be void. . . . .

"In view of these authorities, it is clear that as the constitution of Massachusetts does not require compensation to be first actually made or tendered before the rights of the public in the property taken or applied become complete, the requirements of that instrument are fully met where the statute makes such provision for reasonable compensation as will be adequate and certain in its results. It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner, and gives him an unqualified right to a judgment for the amount of such damages which can be enforced, that is collected by judicial process.

§ 294. "Substantially the same principles have been announced by this court when interpreting the clause of the constitution of the United States that forbids the taking of private property for public use without just compensation. In Cherokee Nation v. Southern Kansas Railway, 135 U. S. 641, 659, it was suggested that the act of Congress there involved violated the constitution of the United States, in that it did not provide for compensation to be made to the plaintiff before the defendant entered upon the lands taken for the purpose of constructing its road over them. This objection was not sustained. The court said: 'The constitution declares that private property shall not be taken "for public use without just compensation." It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision before his occupancy is disturbed. Whether a particular provision be sufficient to secure the compensation to which, under the constitution, he is entitled is sometimes a question of difficulty. In the present case, the requirements of the constitution have, in our judgment, been fully met. The third section provides that before the railway shall be constructed through any lands proposed to be taken, full compensation shall be made to the owner for all property to be taken or damage done by reason of the construction of the road. In the event of an appeal from the finding of the referees, the company is required to pay into court double the amount of the award to abide its judgment; and that being done, the company may enter upon the property sought to be condemned, and proceed with the construction of its road. We are of the opinion that this provision is sufficiently reasonable, certain and adequate to secure the just compensation to which the owner is entitled.' . . . . We are of opinion that, upon both principle and authority, it was competent for the legislature, in the exercise of the police powers of the commonwealth, and of its power to appropriate private property for public uses, to authorize the city to take the fee in the lands described in the statute prior to making compensation, and that the provision made for compensating the owner was certain and adequate."

§ 295. In Kennedy v. Indianapolis, 103 U. S. 599, it was held that where land was appropriated for a canal, while the right to enter and use the property was complete as soon as it was appropriated, the title did not pass until just compensation was made. Waite, C. J., said:

"The constitution of the state (Indiana) adopted in 1816, which was in force when this act was passed, and until all the rights of the state under it had been acquired, contains the following as article I, section 7: 'That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor.' . . . . Not to multiply cases further, it seems to us that both on principle and authority the rule is, under such a constitution as that of Indiana, that the right to enter on and use the property is complete as soon as the property is actually appropriated under the authority of the law for a public use, but that the title does not pass from the owner without his consent until just compensation has been made to him.

"We proceed now to apply this rule to the facts. It is not contended that compensation in money was made for any of the land in dispute. Van Blaricum claimed money, but the tribunal to which, under the statute, his application was referred, decided against him. In effect he was told, in answer to his application, that the benefits he would receive from the construction of the canal would be 'just compensation' to him for his property taken. The town and the lot owners adjoining Missouri Street made no claim for compensation. Neither did Coe, the owner of lot 126. In this way these parties signified, under the law, their willingness to take as their compensation the benefits which would result to them respectively from the construction of the canal. The appropriation was for public use by means of a canal, and the owners were to be paid their compensation for the land taken by the construction of a canal thereon. It would seem to follow that if the canal was constructed, the compensation which the constitution guaranteed the owner would be made; otherwise not. If the canal was in law built, therefore, the title passed to the state; if not, it remained in the owner. The failure to claim damages within the two years was no more than a waiver of all compensation except such as grew out of the benefits resulting from the construction of the work for which the appropriation was made. To hold that the title passed by mere appropriation, if no claim for damages was made within the two years, would be in effect to decide that if the state entered on land for a particular use and kept possession as against the owner for two years, it got a title in fee whether the property was actually put to the use or not. Such we cannot believe to be the law."

CHAPTER XV.

PROCEDURE.

§ 300. No special form of procedure for the condemnation of land and the determination of the compensation to be made, except that there must be a judicial determination of the matters involved, with an opportunity given to the parties, is required by the federal constitution. Except as required by the constitution of the state involved in the particular case, a legislative provision authorizing land to be condemned for certain purposes and the compensation to be assessed by commissioners is valid. Nor is it necessary that the owner have actual notice of the proceedings, provided the proceeding is a judicial one upon such notice as may be reasonably given. A published notice, e. g., is sufficient notice to a nonresident owner, who must therefore at his peril ascertain any condemnation proceedings pending against his property.

So, too, the method of determining the compensation is discretionary with the legislature, and a jury trial is not a matter of right unless especially required by the state constitution.

While the proceedings until the compensation is actually ascertained and paid are in the control of the state and its court, yet when once title has passed upon the payment of compensation, the matter becomes res adjudicata and may not be reopened. Nor upon appeal will the appellate court revise the amount of compensation awarded, for the reason that the appellate court has not and cannot have before it the data and real evidence upon which the discretionary tribunal made its finding.

§ 301. In Shoemaker v. United States, 147 U. S. 282, it was held the appellate court would not interfere with commissioners as to their findings, and that the claimant was not entitled to interest from the time of the initiation of the proceedings. Shiras, J., in the opinion of the court, said:

"The theory of appraisement asked for by the plaintiffs in error differed from the one adopted by the court chiefly in two particulars: first, it treats the case as if it were one before an ordinary jury, whose action is determined by the evidence adduced; and second, that the evidence might have reference to and include any supposed or speculative value given to the property taken by reason of the act of Congress creating the park project; whereas the court regarded the functions of the appraisers as including their own judgment and inspection of the lands taken as well as a consideration of the evidence adduced by the parties.

"We approve of the instructions given by the court in both particulars. The scope of action of the board of commissioners was plainly, by the terms of the act and the nature of the inquiry, not restricted to a mere consideration of the evidence and allegations of the parties, but included the exercise of those powers of judgment and observation which led to their selection as fit persons for such a position.

"While the board should be allowed a wide field in which to extend their investigation, yet it has never been held that they can go outside of the immediate duty before them, viz., to appraise the tracts of land proposed to be taken, by receiving evidence of conjectural or speculative values, based upon the anticipated effect of the proceedings under which the condemnation is had. Kerr v. South Park Commissioners, 117 U. S. 379, 380.

§ 302. "In connection with this part of the subject, we may appropriately consider the objection made to the action of the court below in declining to review and pass upon the evidence that had been produced before the commissioners.

"If, as we have said, the court below was right in refusing to restrict the commissioners to a mere consideration of the evidence adduced, then it would seem to follow that the court could not be legitimately asked, in the absence of any exceptions based upon charges of fraud, corruption or plain mistake on the part of the appraisers, to go into a consideration of the evidence. The court cannot bring into review before it the various sources and grounds of judgment upon which the appraisers have proceeded. The attempt to do so would transfer the function of finding the values of the lands from the appraisers to the court. Such a course would have presented a much more serious allegation of error than we find in the objection as made.

"The rule on this subject is so well settled that we shall content ourselves with repeating an apt quotation from Mills

on Eminent Domain, 246, made in the opinion of the court below: 'An appellate court will not interfere with the report of commissioners to correct the amount of damages except in cases of gross error showing prejudice or corruption. The commissioners hear the evidence and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of evidence. Hence, for an error in the judgment of commissioners in arriving at the amount of damages there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinions of experts or by the apparent weight of evidence, but may give their own conclusions.' . . . .

§ 303. "The fourteenth assignment charges the court with error in refusing to allow interest on the amounts assessed as the values for lands selected for the Rock Creek Park. The argument shows that the interest claimed was for the time that elapsed between the initiation of the proceedings and the payment of the money into court. The vice of this contention is in the assumption that the lands were actually condemned and withdrawn from the possession of their owners by the mere filing of the map. Interest accrues either by agreement of the debtor to allow it for the use of money or in the nature of damages, by reason of the failure of the debtor to pay the principal when due. Of course, neither ground for such a demand can be found in the present case. No agreement to pay the interest demanded is pointed to, and no failure to pay the amount assessed took place. That amount was not fixed and ascertained till the confirmation of the report. Then some of those entitled to the assessments accepted their money, the plaintiffs in error declined to accept, and the amounts assessed in their favor were paid into court, which must be deemed equivalent to payment.

"It is true that, by the institution of proceedings to condemn the possession and enjoyment by the owner are to some extent interfered with. He can put no permanent improvements on the land, nor sell it except subject to the condemnation proceedings. But the owner was in receipt of the rents, issues and profits during the time occupied in fixing the amount to which he was entitled, and the inconveniences to which he was subjected by the delay are presumed to be considered and allowed for in fixing the amount of compensation. Such is the rule laid down in cases of the highest authority. Reid v. Hanover Branch Railroad, 105 Mass. 303; Kidder v. Oxford, 116 Mass. 165; Hamersley v. New York City, 56

N. Y. 533; Norris v. Philadelphia, 70 Penn. St. 332; Chicago v. Palmer, 93 Illinois, 125; Phillips v. South Park Commission, 119 Illinois, 626."

§ 304. In Secombe v. Railroad Company, 23 Wall. 108, in holding that the title of a railroad company to lands condemned in compliance with a legislative act could not be questioned collaterally, Davis, J., said:

"Whether the Minnesota Central Railroad Company, under whom the defendant claims—and which occupied for railroad purposes the land in question long before the deeds of quitclaim under which the plaintiff sets up title were made—whether this company had the right to condemn the land and took the proper steps to condemn it, depends, of necessity, on the laws of the state; and if these laws have been construed by the highest court of the state in a case similar to the one before us, the federal courts are relieved of all difficulty.

"We do not feel called upon to enter into an examination of the several acts on this subject, both public and private, which are quite numerous, in order to show that the Minnesota Central Company had a corporate existence, and was therefore capable of performing an act of condemnation. It is enough to say that the point is settled in favor of the company by the decision and reasoning of the supreme court of Minnesota in St. Paul and Pacific Railroad Company v. Parcher (14 Minn. 297).

"The Minnesota Central Company was authorized by law to procure the condemnation of land for the use of its road, and from the findings of fact by the circuit court it sufficiently appears that the statutory provisions on the subject were observed.

"It is no longer an open question in this country that the mode of exercising the right of eminent domain, in the absence of any provision in the organic law prescribing a contrary course, is within the discretion of the legislature. There is no limitation upon the power of the legislature in this respect, if the purpose be a public one, and just compensation be paid or tendered to the owner for the property taken. This general rule has received the sanction of the supreme court of Minnesota in analogous cases to the one at bar. It hardly need be said that the taking of private property in order that a railroad may be constructed is a public necessity. It is urged that the property in controversy was occupied before the proceedings in condemnation were begun, but there is nothing in the findings of fact to show

that this was so. Even if the plaintiff were in a situation to make the objection, it would not avail him, for prior occupation without authority of law would not preclude the company from taking subsequent measures authorized by law to condemn the land for their use. If the company occupied the land before condemnation without the consent of the owners, and without any law authorizing it, they are liable in trespass to the persons who owned the land at the time, but not to the present plaintiff.

§ 305. "It is urged, also, against the validity of the award of the commissioners that it was not made in reasonable time, or the amount of it ever paid or tendered to the parties in interest. Whether this be so or not does not concern the plaintiff. It is enough for him to know that a judgment was entered confirming the award, and the money paid into the court for the use of Pinney and Osborne, and is there now, unless they have seen fit to withdraw it. It is a fair presumption, as both these persons had notice, actual or constructive, of the proceedings in condemnation and took no steps to review them, that they were either satisfied with the award or concluded they could not make successful opposition to it.

"This suit is an effort to question the propriety of the condemnation and sale of the property in a collateral proceeding, not by the party even whose land was appropriated, but by a stranger to the original proceeding, who, whatever his motive in buying, got no other estate than the original owners could convey—a fee subject to the easement of the railroad company. The judgment of condemnation in this case was rendered by a competent court charged with a special statutory jurisdiction, and all the facts necessary to the exercise of this jurisdiction are shown to exist. A judgment thus obtained is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction. If it were so, railroad companies would have no assurance that the steps taken by them to procure the right of way would conclude anyone, and they would be constantly subject to vexatious litigation."

§ 306. In Huling v. Kaw Valley Railway, 130 U. S. 559, it was held that in a condemnation proceeding under a state statute publication of notice as required by the statute was sufficient notice to a nonresident owner, and, secondly, the fact that one of the commissioners appointed to fix the value and com-

pensation was not a freeholder, as required by the statute, could not be taken advantage of subsequent to the proceedings in a collateral action of trespass. Miller, J., in the opinion of the court, said:

"The transcript on its face seems to be regular in every particular, showing a full compliance with all the requirements of the statute on the subject. There was proper publication made in the newspaper, and, indeed, so far as the face of the record is concerned, no objection seems to be made to it, except that it is very urgently argued that the notice published was not sufficient, because it did not apprise the party of what land was to be taken; and if in that respect it was a sufficient compliance with the statute, it is then insisted that the statute itself was void as authorizing the taking of private property without due process of law.

"In regard to this objection we do not see how the notice is deficient, if any notice short of one actually served upon the party can be sufficient. With regard to the description of the property, the notice gives all that could be known at the time it was published. As the commissioners had the power to determine the precise location of the road, that location could not be described with more precision than it is in the newspaper publication set out in the proceedings. It is directed to all persons owning lands on the line of the railroad as the same is now or may be located through section 23, township 11, range 25, in the county of Wyandotte and state of Kansas; and it notified persons owning land in that section that the commissioners duly appointed would, on Monday, the 22d of May, 1882, proceed to lay off the route for said road through said section, and appraise the value and assess the damages to each quarter section through and over which the railroad might be located. To the plaintiffs in this case, who are the owners of a quarter section of land in section 23 of that township, this was a sufficient warning that the road might run through their land at that point, and sufficient notice of the time and place where this matter would be determined, as also the amount to which they would be entitled for the appropriation of their land. If this notice had been read by the plaintiffs, it was a clear and distinct notification to them that it would be determined at that time whether any, and how much, of their land in section 23 would be taken for the railroad, and the value to be set upon it by the commissioners; and we think that this was all the notice they had a right to require. Of course the statute goes upon the presumption that, since all the parties cannot be served

personally with such notice, the publication, which is designed to meet the eyes of everybody, is to stand for such notice. The publication itself is sufficient if it had been in the form of a personal service upon the party himself within the county. Nor have we any doubt that this form of warning owners of property to appear and defend their interests, where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action of the tribunals appointed by proper authority to determine those matters.

§ 307. "The owner of real estate, who is a nonresident of the state within which the property lies, cannot evade the duties and obligations which the law imposes upon him in regard to such property, by his absence from the state. Because he cannot be reached by some process of the courts of the state, which, of course, have no efficacy beyond their own borders, he cannot, therefore, hold his property exempt from the liabilities, duties and obligations which the state has a right to impose upon such property; and in such cases some substituted form of notice has always been held to be a sufficient warning to the owner of the proceedings which are being taken under the authority of the state to subject his property to those demands and obligations. Otherwise the burdens of taxation, and the liability of such property to be taken under the power of eminent domain, would be useless in regard to a very large amount of property in every state of the Union.

"It is therefore the duty of the owner of real estate who is a nonresident, to take measures that in some way he shall be represented when his property is called into requisition; and if he fails to do this, and fails to get notice by the ordinary publications which have usually been required in such cases, it is his misfortune, and he must abide the consequences. Such publication is 'due process of law' as applied to this class of cases. Harvey v. Tyler, 2 Wall. 328; Secombe v. Railroad Co., 23 Wall. 108; Pennoyer v. Neff, 95 U. S. 714, 722, 743, 744; Hagar v. Reclamation District, 111 U. S. 701; McMillen v. Anderson, 95 U. S. 37; Davidson v. New Orleans, 96 U. S. 97, 105; Boom Co. v. Patterson, 98 U. S. 403, 406.

§ 308. "Conceding that these proceedings subjected the land in controversy to the jurisdiction of the commissioners appointed by the district judge of Wyandotte County, the question as to whether one of those commissioners was a freeholder or not is not open to consideration in this suit. The commission-

ers were regularly appointed by the proper officer, and took the proper oath, and have discharged their duties in the manner required by law. The railroad company has paid the money and taken possession of the land which was condemned by those commissioners. The plaintiffs cannot recover in the present action without a holding in this collateral proceeding that all that was done by those commissioners is void by reason of this want of qualification in one of their number. The proper time for these plaintiffs to have taken their objection to Mr. Wood, as a commissioner, was either at the time of his appointment or at the time he proceeded to act as commissioner. If it be objected that they could not be supposed to have any notice of the application for the appointment of these commissioners and of the time and place when the judge would act on that application, the law presumes that they had notice, and might have attended at the time the commissioners entered upon their duties. If this objection had been then taken it might have been sustained, or it could have been taken by way of appeal from the proceedings of the commissioners; but to permit such an objection as this to prevail at this time, and thus defeat the whole of the proceedings upon this narrow ground, is a proposition unsupported by sound principle or by authority. It is a collateral attack upon a proceeding which has been completed according to the forms of law. There is no more reason why this want of qualification should, when shown at this stage of the proceeding, invalidate it all, than there is why the discovery, after a judgment and after that judgment has passed beyond the control of the court, that one of the jurors was disqualified should make absolutely void the verdict and judgment. It is only one of those cases frequently occurring in the administration of the law, in which it is better that errors not pointed out at the proper time should be disregarded than that by attempts to correct them evils much worse should follow than those incident to the error. Commrs. of Leavenworth Co. v. Espen, 12 Kansas, 531; Venard v. Cross, 8 Kansas, 248; Cooper v. Reynolds, 10 Wall. 308; Voorhees v. Bank of the United States, 10 Pet. 449.''

§ 309. In United States v. Jones, 109 U. S. 513, it was held that the liability to make compensation for property taken for public uses under eminent domain is a limitation of the right of eminent domain which is incident to sovereignty, and the determination of the compensation may be delegated by the

United States government to any tribunal, state or special. Field, J., said:

"The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and as said in Boone v. Patterson, 98 U. S. 106, requires no constitutional recognition. The provision found in the fifth amendment to the federal constitution, and in the constitutions of the several states, for just compensation for the property taken is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. It is undoubtedly true that the power of appropriating private property to public uses vested in the general government—its right of eminent domain, which Vattel defines to be the right of disposing, in case of necessity and for the public safety, of all the wealth of the country—cannot be transferred to a state any more than its other sovereign attributes; and that, when the use to which the property taken is applied is public, the propriety or expediency of the appropriation cannot be called in question by any other authority. But there is no reason why the compensation to be made may not be ascertained by any appropriate tribunal capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the appropriating power.

§ 310. "The proceeding for the ascertainment of the value of the property and consequent compensation to be made is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value and to be heard thereon. Whether the tribunal shall be created directly by an act of Congress or one already established by the states shall be adopted for the occasion is a mere matter of legislative discretion. Undoubtedly it was the purpose of the constitution to establish a general government independent of, and in some respects superior to, that of the state governments—one which could enforce its own laws through its own officers and tribunals; and this purpose was accomplished. That government can create all the officers and tribunals re-

quired for the execution of its powers. Upon this point there can be no question. Kohl v. United States, 91 U. S. 367. Yet from the time of its establishment that government has been in the habit of using, with the consent of the states, their officers, tribunals and institutions as its agents. Their use has not been deemed violative of any principle or as in any manner derogating from the sovereign authority of the federal government; but as a matter of convenience and as tending to a great saving of expense."

§ 311. In Garrison v. City of New York, 21 Wall. (88 U. S.) 196, in holding that an award in condemnation proceedings could be vacated at any time before payment when title passed, that the award was not a contract, and that a statute authorizing its vacation was not unconstitutional, Field, J., said:

"In the proceeding to condemn the property of the plaintiff for a public street there was nothing in the nature of a contract between him and the city. The state, in virtue of her right of eminent domain, had authorized the city to take his property for a public purpose, upon making to him just compensation. All that the constitution or justice required was that a just compensation should be made to him, and his property would then be taken whether or not he assented to the measure. The procceding to ascertain the benefits or losses which will accrue to the owner of property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the state, and is necessarily under her control. It is her duty to see that the estimates made are just, not merely to the individual whose property is taken, but to the public which is to pay for it. And she can to that end vacate or authorize the vacation of any inquest taken by her direction to ascertain particular facts for her guidance, where the proceeding has been irregularly or fraudulently conducted, or in which error has intervened, and order a new inquest, provided such methods of procedure be observed as will secure a fair hearing from the parties interested in the property. Nor do we perceive how this power of the state can be affected by the fact that she makes the finding of the commissioners upon the inquest subject to the approval of one of her courts. That is but one of the modes which she may adopt to prevent error and imposition in the proceedings. There is certainly nothing in the fact that an appeal is not allowed from the action of the court in such cases, which precludes a resort

to other methods for the correction of the finding where irregularity, mistake or fraud has intervened.

"Until the property is actually taken and the compensation is made as provided, the power of the state over the matter is not ended. Any declaration in the statute that the title will vest at a particular time must be construed in subordination to the constitution, which requires, except in cases of emergency admitting of no delay, the payment of the compensation or provision for its payment, to precede the taking or, at least, to be concurrent with it."

EXISTING CORPORATION LAWS

OF THE

STATE OF WASHINGTON

RELATING TO

THE ORGANIZATION AND REGULATION OF CORPORATIONS AND DEFINING THEIR POWERS AND PRIVILEGES

INCLUDING

LAWS RELATING TO THE ADMISSION OF FOREIGN CORPORATIONS DESIRING TO DO BUSINESS IN THE STATE

EXISTING CORPORATION LAWS, 1913

FORMATION OF GENERALLY

§ 401. How Organized—Conditions and Liabilities.

[§ 3677, Rem.–Bal.] Corporations for manufacturing, mining, milling, wharfing and docking, mechanical, banking, mercantile, improvement and building purposes, or for the building, equipping and managing water flumes for the transportation of wood and lumber, or for the purpose of building, equipping and running railroads, or constructing canals or irrigation canals, or engaging in any other species of trade or business, may be formed according to the provisions of this chapter; such corporations and the members thereof being subject to all the conditions and liabilities herein imposed, and to none others: Provided, that no such corporation shall commence business or institute proceedings to condemn land for corporate purposes until the whole amount of its capital stock has been subscribed: And provided further, that the provisions of the foregoing proviso shall not apply to corporations engaged exclusively in loaning money on real estate, nor to corporations engaged exclusively in raising money from, and loaning, or repaying it to, their own members, and which confine their loaning and business operations wholly to the counties of their principal place of business, respectively, and to the counties adjacent and adjoining thereto. [Laws 1895, § 1, p. 338; Cd. 1881, § 2421; 1 H. C., § 1497; Bal., § 4250.]

Loaning money on real estate excepted from statutory restriction on doing business before whole amount of capital stock subscribed. (Brown v. Elwell, 17 Wash. 442, 49 Pac. 1068.)

The fact that the corporation has not complied with the statutory requirement that entire stock be subscribed before doing business cannot be raised to the injury of third parties. (Spokane v. Amsterdamsch Trustees Kantoor, 22 Wash. 172, 60 Pac. 141.)

Subscribers to stock of company, which has begun business before all its stock is subscribed, are not liable on the subscriptions unless they have by their acts and conduct waived the conditions. Part payment of subscriptions without notice not a waiver. (Birge v. Browning, 11 Wash. 249, 39 Pac. 643.)

A subscription to capital stock not enforceable until the entire capital stock is subscribed. (Denny Hotel Co. v. Schram, 6 Wash. 134, 32 Pac. 1002; Denny Hotel Co. v. Gilmore, 6 Wash. 152, 32 Pac. 1004; Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089.)

That all the capital stock was never subscribed is a good defense to an action on a stock subscription. (Birge v. Browning, 11 Wash. 249, 39 Pac. 643.)

A corporation is a citizen within the statute (24 Stats. at Large, 557) authorizing citizens to buy government lands. (Ramsay v. Tacoma Land Co., 31 Wash. 351, 71 Pac. 1024.)

A corporation not liable on contract between stockholders prior to incorporation. (Bash v. Culver Gold Min. Co., 7 Wash. 122, 34 Pac. 462.)

Corporation liable for malicious prosecution. (Nichelson v. Cameron Lumber Co., 39 Wash. 569, 81 Pac. 1059.)

A national bank is liable for a fraud committed by it. (Pronger v. Old Nat. Bank, 20 Wash. 618, 56 Pac. 391.)

A corporation organized under laws of this state is domestic though majority of stock owned by aliens. (Hastings v. Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776.)

Transaction of business by a corporation before all its stock subscribed does not render the officers liable for debts of the company when insolvent, their liability being prescribed by Ballinger's Code, sections 4265, 4266. (American Radiator Co. v. Kinnear, 56 Wash. 210, 105 Pac. 630.)

Parties dealing with a corporation estopped to deny its legal existence. (Carroll v. Pacific Nat. Bank, 19 Wash. 639.)

General demurrer to complaint will not raise question of incorporation. (Sly v. Palo Alto Gold Mining Co., 28 Wash. 485.)

Stock-books presumptive evidence that all stock subscribed. (State ex rel. Columbia Valley R. Co. v. Superior Court, 45 Wash. 316.)

Subscription by stenographer held valid to complete total subscription. (State ex rel. Northern Pacific R. Co. v. Superior Court, 49 Wash. 390.)

Articles of incorporation of railroad need not state route, length or termini. (State ex rel. Milwaukee Term. R. Co. v. Superior Court, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175.)

Subscription to entire capital stock must be alleged and proved by the railroad company in condemnation proceedings. (State ex rel. Hulme v. Gray's Harbor etc. Co., 54 Wash. 530, 103 Pac. 809.)

§ 402. Articles of Incorporation to be Filed—Contents, etc.

[§ 3679, Rem.–Bal.] Any two or more persons, who may desire to form a company for one or more of the purposes specified in the preceding section, shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the acknowledgment of deeds, and file one of such articles in the office of the Secretary of State, and another in the office of the county auditor of the county in which the principal place of business of the company is intended to be located, and retain the third in the possession of the corporation. Said articles shall state the corporate name of the company, the objects for which the same shall be formed, the amount of its capital stock, the time of its existence, not to exceed fifty years, provided, that this limit of existence shall not apply to any life, accident and health insurance company; the number of shares of which the capital stock shall consist, the number of trustees and their names, who shall manage the concerns of the company for such length of time (not less than two nor more than six months) as may be designated in such certificate, and the name of the city, town or locality and county in which the principal place of business of the company is to be located. Amendments may be made to the articles of incorporation by a majority vote of its trustees and the vote or written assent of two-thirds of the capital stock of such corporation. If the written assent of two-thirds of the capital stock has not been obtained then the vote of said stock may be taken at any regular meeting of the stockholders or at any special meeting of the stockholders called for that purpose in the manner provided in the by-laws of such corporation for special meetings of the stockholders. The president and secretary of said corporation shall certify said amendments in triplicate under the seal of said corporation to be correct and file and keep the same as in the case of original articles, and from the time of filing said amendments such corporation shall have the same powers, and it and the stockholders thereof shall be subject to the same liabilities as if such amendments had been embraced in the original articles of incorporation. Nothing

contained in this section shall be construed to cure or amend any defect existing in any original articles of incorporation in that such articles did not set forth the matters required to make the same valid at the time of filing, nor to cure or amend any defect in the execution thereof. The time of existence of such corporation shall not be extended by amendments beyond the time fixed in the original articles of incorporation. [Laws 1905, § 1, c. 11, p. 228; Cd. 1881, § 2422; 1 H. C., § 1498; Bal., § 4251.]

Person construed to be individual as distinct from corporation. (Denny Hotel Co. v. Schram, 6 Wash. 134.)

Articles of incorporation cannot confer greater power than statute authorizes. (Spokane v. Amsterdamsch Trustees, 22 Wash. 172, 60 Pac. 141; Parsons v. Tacoma Smelting Co., 25 Wash. 492, 65 Pac. 765.)

Unless authorized by the articles of incorporation, a lease of all the corporate property cannot be made without the consent of all the stockholders. (Parsons v. Tacoma Smelting & Refining Co., 25 Wash. 492, 65 Pac. 765.)

Mere use of corporate name, no articles being filed, does not constitute de facto corporation. (Bash v. Culver Gold Min. Co., 7 Wash. 122, 34 Pac. 462.)

Whether a corporation is de jure or de facto can be raised only in an appropriate proceeding. (State ex rel. Amsterdamsch Trustees Kantoor v. Superior Court, 15 Wash. 668, 47 Pac. 31.)

Objection that corporation is not legally formed cannot be raised to injury of third parties with whom it has done business. (Carroll v. Pacific Nat. Bank, 19 Wash. 639, 54 Pac. 32.)

General demurrer does not raise question of incorporation. (Sly v. Palo Alto Gold Mining Co., 28 Wash. 485, 68 Pac. 871.)

Mandamus will not issue to compel secretary to file improper articles. (State ex rel. Baker etc. R. Co. v. Nichols, 51 Wash. 619, 99 Pac. 876.)

Corporation whose business is confined to loaning on real estate excepted from statutory restriction upon doing business before stock subscribed. (Brown v. Elwell, 17 Wash. 442, 49 Pac. 1068.)

Articles of incorporation constitute a contract between all stockholders, and cannot be abrogated without consent of all. (Parsons v. Tacoma Smelting & Refining Co., 25 Wash. 492, 65 Pac. 765.)

Domestic corporation organized by aliens not an alien or foreign corporation. (Hastings v. Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776.)

§ 403. List of Officers to be Filed.

[§ 3691, Rem.–Bal.] Every corporation heretofore organized under the laws of the territory or state of Washington, and every corporation which may hereafter be organized under the laws of this state, shall, on or before the second Tuesday of January of each year, and at such other times as such corporations may elect so to do, file with the county auditor of the county in which such corporation has its principal place of business, a statement, sworn to by its president and attested by its secretary and sealed with its corporate seal, containing a list of all its officers and their respective titles of office, names and addresses, and the term of office for which they have been chosen. [Laws 1895, § 1, p. 355; Bal., § 4259.]

§ 404. Corporations Hereafter Organized to File Statement.

[§ 3692, Rem.–Bal.] Every corporation which shall be hereafter organized under the laws of this state, shall, within thirty days after it shall have filed its certificate of incorporation with the county auditor of the county in which it has its principal place of business, file with such county auditor a statement, sworn to by its president and attested by its secretary and sealed with its corporate seal, containing a list of all of its officers and their respective titles of office, names and address, and the term of office for which they have been chosen. [Laws 1895, § 2, p. 355; Bal., § 4260.]

Failure to file list does not warrant service on one who had ceased to be connected with the company. (Lushington v. Seattle etc. Club, 60 Wash. 546, 111 Pac. 785.)

§ 405. Copy of Articles as Evidence.

[§ 3682, Rem.–Bal.] A copy of any certificate of incorporation filed in pursuance of this chapter, and certified by the auditor of the county in which it is filed, or his deputy, or by the Secretary of State, shall be received in all courts and places as prima facie evidence of the facts therein stated. [Laws 1873, § 3, p. 399; Cd. 1881, § 2423; 1 H. C., § 1499; Bal., § 4252.]

Parol evidence that a company is doing a national banking business is prima facie evidence that it is a corporation. (Yakima National Bank v. Knipe, 6 Wash. 348, 33 Pac. 834.)

Oral evidence of existence of corporation competent prima facie case thereof. (National Bank of Commerce v. Galland, 14 Wash. 502, 45 Pac. 35.)

Certificate of county auditor showing corporate existence under Ballinger's Code, section 4252, prima facie proof thereof. (Spokane & Idaho Lumber Co. v. Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119.)

Testimony that a person is president of a company and that the company owns certain premises is prima facie proof of existence of the company. (Stanford Land Co. v. Steidle, 28 Wash. 72, 68 Pac. 178.)

Oral proof of existence of corporation when admitted without objection is sufficient substitute for certified copy of articles. (State v. Pittam, 32 Wash. 137, 72 Pac. 1042.)

Corporate existence is admitted by filing an answer as that of the company. (Frost v. Ainslee Lumber Co., 3 Wash. 241, 28 Pac. 354, 915; Sengfelder v. Mutual Life Ins. Co., 5 Wash. 121, 31 Pac. 428; Garneau v. Port Blakely Mill Co., 8 Wash. 467, 36 Pac. 463.)

Principal and sureties on bond to attach property of corporation estopped to deny its existence. (Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 Pac. 650.)

Mere use of corporate name will not constitute estoppel to deny corporate existence. (Bash v. Culver Gold Min. Co., 7 Wash. 122, 34 Pac. 462.)

Partial payments on stock subscriptions do not necessarily raise estoppel to deny corporate existence. (Birge v. Browning, 11 Wash. 249, 39 Pac. 643.)

Failure to allege corporate capacity on the part of a defendant corporation is only bad on demurrer. (Tobnie v. Dean, 1 Wash. Ter. 46; Sengfelder v. Mutual Life Ins. Co., 5 Wash. 121, 31 Pac. 428; Garneau v. Port Blakely Mill Co., 8 Wash. 467, 36 Pac. 463.)

Certified copy of articles not exclusive method of proof. (State ex rel. Clark v. Clallam, 62 Wash. 612, 114 Pac. 444.)

§ 406. Corporate Powers Enumerated.

[§ 3683, Rem.–Bal.] When the certificate [articles] shall have been filed, the persons who shall have signed and acknowledged the same, and their successors, shall be a body corporate and politic in fact and in name, by the name stated in their certificate, and by their corporate name have succession for the period limited, and shall have power—

1. To sue and be sued in any court having competent jurisdiction.

2. To make and use a common seal, and to alter the same at pleasure.

3. To purchase, hold, mortgage, sell and convey real and personal property.

4. To appoint such officers, agents, and servants as the business of the corporation shall require, to define their powers, prescribe their duties, and fix their compensation.

5. To require of them such security as may be thought proper for the fulfillment of their duties, and to remove them at will; except that no trustee shall be removed from office unless by a vote of two-thirds of the stockholders as hereinafter provided.

6. To make by-laws not inconsistent with the laws of this state or the United States.

7. The management of its property, the regulation of its affairs, the transfer of its stock, and for carrying on all kinds of business within the objects and purposes of the company as expressed in the articles of incorporation. [Laws 1873, § 4, p. 399; Cd. 1881, § 2424; 1 H. C., § 1500; Bal., § 4253.]

Articles of incorporation cannot confer greater power than the statute authorizes. (Spokane v. Amsterdamsch Trustees, 22 Wash. 172, 60 Pac. 141; Parsons v. Tacoma Smelting Co., 25 Wash. 492, 65 Pac. 765.)

A by-law may be abrogated by the stockholders by their acquiescence in its disregard by the directors. (Blair v. Metropolitan Savings Bank, 27 Wasn. 192, 67 Pac. 609.)

A by-law providing for certain dividends has force of a contract. (Seattle Trust Co. v. Pitner, 18 Wash. 401, 51 Pac. 1048.)

Stockholders employed by the corporation are entitled to reasonable remuneration. (Cors & Wegener v. Ballard Iron Works, 41 Wash. 390, 83 Pac. 900.)

A stockholder may, under Ballinger's Code, sections 5780, 5781, by quo warranto proceeding, oust an officer of the company illegally holding office. (State ex rel. Mitchell v. Horan, 22 Wash. 197, 60 Pac. 135.)

Title to corporate office cannot be tried in action of replevin to recover property of the company. (Standard Gold Min. Co. v. Byers, 31 Wash. 100, 71 Pac. 766.)

Appointment of counsel of company by vice-president in absence of president valid and binding. (Fernald v. Spokane & B. C. Tel. Co., 31 Wash. 672, 72 Pac. 462.)

Trustees elected by minority of old board de facto officers. (Baggot v. Turner, 21 Wash. 339, 58 Pac. 212.)

De facto trustees have capacity to transact corporate business. (Spokane v. Amsterdamsch Trustees Kantoor, 22 Wash. 172, 60 Pac. 141.)

Trustee selling his stock ipso facto ceases to be trustee under Ballinger's Code, section 4255. (Oudin & Bergman etc. Min. Co. v. Conlan, 34 Wash. 216, 75 Pac. 798.)

To expel trustee from office under Ballinger's Code, section 4255, vote of two-thirds of shares of stock required. (State ex rel. Mitchell v. Horan, 22 Wash. 197, 60 Pac. 135.)

Meeting of board of trustees presumed to be regularly called. Notice not spread on records may be proved aliunde. (Budd v. Walla Walla etc. Co., 2 Wash. Ter. 347, 7 Pac. 896.)

Same person may be president and secretary of board of trustees. (Budd v. Walla Walla etc. Co., 2 Wash. Ter. 347, 7 Pac. 896.)

Trustee cannot recover for services within his duties as trustee unless there is some provision therefor other than by the trustees. (Burns v. Commencement Bay Land Co., 4 Wash. 558, 30 Pac. 668, 709.)

One bona fide claiming to be officer and in possession of books, records, etc., will not be ousted by injunction pending the determination of the right. (Standard Gold Min. Co. v. Byers, 31 Wash. 100, 71 Pac. 766.)

Officers of company liable to creditors and others imjured for using corporate name and property in their individual business. (Morrison v. Blue Star Nav. Co., 26 Wash. 541, 67 Pac. 244.)

A trustee may contract with the corporation if his conduct be open and fair. (Budd v. Walla Walla etc. Co., 2 Wash. Ter. 347, 7 Pac. 896.)

Contracts by directors of corporation with themselves not avoided where proof of consideration and good faith. (Roy & Co. v. Scott, Hartley Co., 11 Wash. 399, 39 Pac. 679.)

No violation of his official trust for an officer of a company to buy corporate stock from a stockholder. (O'Neile v. Ternes, 32 Wash. 528, 73 Pac. 692.)

Contract between two corporations having same board of trustees not void but voidable, and capable of ratification. (Roberts v. Washington Nat. Bank, 11 Wash. 550, 40 Pac. 225.)

Whether fraud in the issue of warrant to trustee of company question of fact for jury. (Budd v. Walla Walla etc. Co., 2 Wash. Ter. 347, 7 Pac. 896.)

General powers of corporation include right to loan money. (Brown v. Elwell, 17 Wash. 442, 49 Pac. 1068.)

A company may be organized to do several kinds of business. (Kiggins v. Munday, 19 Wash. 233, 52 Pac. 855.)

A corporation has only such powers as are conferred upon it expressly or are necessarily incidental to its purposes. (Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067.)

"Water rights" construed as used incidentally to powers of mining company, and not to give right of eminent domain as water company. (State ex rel. Morrell v. Superior Court, 33 Wash. 542, 74 Pac. 686.)

A farming corporation may act and sue as trustee. (Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. 588.)

A lumber company construed not to have power to become accommodation surety. (Washington Mill Co. v. Sprague Lum. Co., 19 Wash. 165, 52 Pac. 1067.)

A contract ultra vires the charter is void. (Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067.)

A loan originally ultra vires subsequently authorized by amendment of charter and ratified binding on the corporation. (Blair v. Metropolitan Savings Bank, 27 Wash. 192, 67 Pac. 609.)

A franchise granted by public officers ultra vires cannot be ratified or supported by estoppel. (State ex rel. Spring Water Co. v. Monroe, 40 Wash. 545, 82 Pac. 888.)

Lessee cannot question power of lessor corporation to make lease. (Hall & Paulson Furn. Co. v. Wilbur, 4 Wash. 644, 30 Pac. 665.)

Corporation having received benefit of contract estopped to plead ultra vires. (Tootle v. First Nat. Bank, 6 Wash. 181, 33 Pac. 345; Allen v. Olympia Light & Power Co., 13 Wash. 307, 43 Pac. 55; Wheeler, Osgood & Co. v. Everett Land Co., 14 Wash. 630, 45 Pac. 316; Spokane v. Amsterdamsch Trustees Kantoor, 22 Wash. 172, 60 Pac. 141; Graton & Knight Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 Pac. 879; Krisch v. Interstate Fisheries Co., 39 Wash. 381, 81 Pac. 855.)

De facto trustees may transact business for the corporation. (Spokane v. Amsterdamsch Trustees Kantoor, 22 Wash. 172, 60 Pac. 141.)

Resolution of board not necessary to create authority in agent of corporation. (Roberts v. Washington Nat. Bank, 11 Wash. 550, 40 Pac. 225.)

Transactions between two corporations carried on by one common agent not necessarily invalid for that reason. (Roberts v. Washington Nat. Bank, 11 Wash. 550, 40 Pac. 225.)

Where manager of corporation stated that he was acting as manager of the company, the transaction is to be regarded as made in his representative capacity. (Sutter v. Moore Inv. Co., 30 Wash. 333, 70 Pac. 746.)

A transaction extrinsic to the general business of a corporation and not within authority of the general manager not binding on the corporation. (Cosh-Murray Co. v. Adair, 9 Wash. 686, 38 Pac. 749.)

Authority to make contracts is not authority to rescind contracts. (Wallace v. Oceanic Packing Co., 25 Wash. 143, 64 Pac. 938.)

Authority to sign bond as surety would be presumably for bond for penalty, not liquidated damages. (Roberts v. Washington Water Power Co., 19 Wash. 392, 53 Pac. 664.)

Acts of officers customarily performed and ratified are as binding on the company as if expressly authorized. (Duggan v. Pacific Boom Co., 6 Wash. 593, 34 Pac. 157; Miller v. Washington T. R. Co., 11 Wash. 414, 39 Pac. 673; Tootle v. First Nat. Bank, 6 Wash. 181, 33 Pac. 345; Seal v. Puget Sound Loan & Inv. Co., 5 Wash. 422, 32 Pac. 214.)

Corporation not bound by unratified acts of agent without authority, express or implied. (Elwell v. Puget Sound etc. R. Co., 7 Wash. 487, 35 Pac. 376.)

Deed by de facto officers not void but voidable. (Baggot v. Turner, 21 Wash. 339, 58 Pac. 212.)

Acts of one held out as manager or officer of corporation or acquiesced in binding on the corporation. (Carrigan v. Port Crescent Imp. Co., 6 Wash. 590, 34 Pac. 148; Anderson v. Wallace Lumber & Mfg. Co., 30 Wash. 147, 70 Pac. 247; Seal v. Puget Sound Loan etc. Co., 5 Wash. 422, 32 Pac. 214; Miller v. Washington So. R. Co., 11 Wash. 414, 39 Pac. 673; Saunders v. United States Marble Co., 25 Wash. 475, 65 Pac. 782; Duggan v. Pacific Broom Co., 6 Wash. 593, 34 Pac. 157; Roy & Co. v. Scott, Hartley & Co., 11 Wash. 399, 39 Pac. 679; Atlantic Trust Co. v. Behrend, 15 Wash. 466, 46 Pac. 642; West Seattle Land Co. v. Novelty Mill Co., 31 Wash. 435, 72 Pac. 69.)

When a company for two years makes no move to rescind a sale of real estate by an officer without authority, the company is bound. (Coolidge v. Schering, 32 Wash. 557, 73 Pac. 682.)

A corporation accepting and retaining benefits of transactions is estopped from denying authority of the officers making the transaction. (Dexter Horton & Co. v. Long, 2 Wash. 435, 27 Pac. 271; Allen v. Olympia Light & Power Co., 13 Wash. 307, 43 Pac. 55; Windsor v. St. Paul Min. R. Co., 37 Wash. 156, 79 Pac. 613; Leslie v. Wilshire, 6 Wash. 282, 33 Pac. 505.)

A contract may be ratified by an admission of its execution in a pleading. (Tingley v. Bellingham Bay Boom Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055.)

Where an indorsement of a promissory note by a corporation payee is regular in form, it raises presumption of authority. (Citizens' Nat. Bank of Tacoma v. Wintler, 14 Wash. 558, 45 Pac. 38.)

Charter of company showing authority of agent is admissible in evidence for that purpose. (Pacific Nat. Bank v. Aetna Indemnity Co., 33 Wash. 428, 74 Pac. 590.)

Whether the facts show authority in the agent of the corporation is a question for the jury. (Saunders v. United States Marble Co., 25 Wash. 475, 65 Pac. 782.)

An ultra vires lease is voidable. (Parsons v. Tacoma Smelting & Refining Co., 25 Wash. 492, 65 Pac. 765.)

An agreement to sell all the corporate property to another company is in violation of Ballinger's Code, section 4265, and fraudulent. (Ta-

coma Ledger Co. v. Western Home Bldg. Assn., 37 Wash. 467, 79 Pac. 992.)

Stockholders of insolvent corporation cannot dispose of the assets of the company to the detriment of the creditors. (Mitchell v. Jordan, 36 Wash. 645, 79 Pac. 311.)

A sale of all the assets of a company to a reorganized company in the absence of fraud is not ultra vires and void as to minority stockholders. (Pitcher v. Lone Pine Surprise etc. Min. Co., 39 Wash. 608, 81 Pac. 1047.)

A contract ultra vires the charter is void as to creditors. (Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067.)

Contract of employment by corporation may be shown by the facts. (Meals v. De Soto Placer Mines Co., 33 Wash. 302, 74 Pac. 470.)

A trading corporation has implied power to purchase and indorse bills and notes. (Jamieson & McFarland v. Heim, 43 Wash. 153, 86 Pac. 165.)

Conditions inserted in mortgage not specifically authorized by resolution authorizing the mortgage do not render the mortgage void. (Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396.)

Lumber company has implied power to become surety on bond of contractor to whom it furnishes material, such being the custom. (Wheeler, Osgood & Co. v. Everett Land Co., 14 Wash. 630, 45 Pac. 316.)

A corporation employing a physician to care for sick employees as a charity and not for profit is not liable for the malpractice or negligence of the physician, but only for reasonable care in his selection. (Richardson v. Carbon Hill Coal Co., 10 Wash. 648, 39 Pac. 95.)

Only the state can question the ultra vires acts of a company. (Frost v. Puget Sound Realty Associates, 57 Wash. 629, 107 Pac. 1029.)

Promise by treasurer, "I will upon demand accept a return of his stock and refund to him the money he has paid," signed, "———, Treas.," held to bind the treasurer personally. (Gavazza v. Plummer, 53 Wash. 14, 101 Pac. 370.)

In the absence of charter authority, a corporation cannot become surety on a note. (Spencer v. Alki Point Transp. Co., 53 Wash. 77, 101 Pac. 509.)

Insurance company cannot set up plea of ultra vires to note for which it had received benefits. (Jackson v. Mercantile Mut. Fire Ins. Co., 45 Wash. 244, 88 Pac. 127.)

Where a corporation holds one out as its agent, and persons act with the agent as with the company, the corporation is estopped to deny the agent's authority. (Chilcott v. Wash. State Colonization Co., 45 Wash. 148, 88 Pac. 113; Russell v. Schade Brewing Co., 49 Wash. 362, 95 Pac. 327; Moses Land Scrip & Realty Co. v. Stack, Gibbs Lumber Co., 56 Wash. 529, 106 Pac. 207; Livieratos v. Commonwealth Sec. Co., 57 Wash. 376, 106 Pac. 1125; Rowland v. Carroll Loan & Inv. Co., 44 Wash. 413, 87 Pac. 482; Harvey v. Sparks Bros., 45 Wash. 578, 88 Pac. 1108; Iona Warehouse Co. v. Van Buren, 50 Wash. 375, 97 Pac.

291; Nelson v. Western Steam Nav. Co., 52 Wash. 177, 100 Pac. 325; McKinley v. Mineral Hill Consol. Min. Co., 46 Wash. 162, 89 Pac. 495; National Bank of Commerce v. Puget Sound Biscuit Co., 61 Wash. 192, 112 Pac. 265.)

Where the president and general manager of a corporation directs a trespass to be committed, both are jointly and severally liable for the torts of the company. (Lytle Logging etc. Co. v. Humptulips Driving Co., 60 Wash. 559, 111 Pac. 774.)

Where an officer and trustee owning half the stock increases his own salary by his own and the votes of subservient trustees, such action is fraudulent. (Boothe v. Summit Coal Min. Co., 55 Wash. 167, 104 Pac. 207.)

Secretary and manager of corporation cannot purchase its property at tax sale without color of fraud. (Collins v. Hoffman, 62 Wash. 278, 113 Pac. 625.)

An officer owning only two shares of stock presumed to be entitled to reasonable wages and entitled to offset claim for wages against claim for material sold to him by the company. (Argo Mfg. Co. v. Parker, 52 Wash. 100, 100 Pac. 188.)

Fact that defendant corporation had knowledge of pending suit against it will not dispense with proper service upon it. (Osborne v. Columbia etc. Co., 9 Wash. 666, 38 Pac. 160.)

If an action is begun against a corporation in the wrong county, the court gets no jurisdiction of the company. (McMaster v. Thresher Co., 10 Wash. 147, 38 Pac. 760.)

All meetings of the company presumed regular, and the fact that one person acted as president, chairman and secretary would not invalidate the proceedings. (Budd v. W. W. P. & P. Co., 2 Wash. Ter. 347, 7 Pac. 896.)

In showing proceedings of the board of directors, all that was said and done at the meeting is admissible. (Tibbals v. Mt. Olympus Water Co., 10 Wash. 329, 38 Pac. 1120.)

Where the receiver of a company has been appointed, officers of the company cannot be examined in supplementary proceedings. (Allen v. Stallcup, 13 Wash. 631, 43 Pac. 884.)

Conveyance of real estate to the company for purpose outside its charter authority may be voidable, but is not void. (Milton v. Crawford, 65 Wash. 145, 118 Pac. 32.)

Power of removal (subdivision 5) held to constitute part of a contract of employment. (Llewellyn v. Aberdeen Brewing Co., 65 Wash. 319, 118 Pac. 30.)

§ 407. Corporate Powers, How Exercised—By-laws, etc.

[§ 3686, Rem.–Bal.] The corporate powers of a corporation shall be exercised by a board of not less than two trus-

tees, who shall be stockholders in the company, and at least one of whom shall be a resident of the state of Washington, and a majority of them citizens of the United States, who shall, before entering upon the duties of their office, respectively take and subscribe to an oath, as provided by the laws of this state, and who shall, after the expiration of the term of the trustees first elected, be actually elected by the stockholders, at such time and place, within this state, and upon such notice, and in such manner, as shall be directed by the by-laws of the company, but all elections shall be by ballot, and each stockholder, either in person or by proxy, shall be entitled to as many votes as he may own, or represent by proxy, shares of stock, and the person or persons receiving the greatest number of votes shall be trustee or trustees: Provided, that nothing herein contained shall prevent any corporation, by their by-laws, limiting such bona fide shareholder to a single vote, or one vote for every full share of paid-up stock, or its equivalent in assessable stock, disregarding the number of shares of stock he may own. It shall be competent, at any time, for two-thirds of the stockholders of any corporation organized under this chapter to expel any trustee from office, and to elect another to succeed him. In all cases where a meeting of the stockholders is called for the purpose of expelling a trustee and electing his successor, such notice shall be given of the meeting as the by-laws of the company may require. Whenever any vacancy shall happen among the trustees by death, resignation or otherwise, except by removal, and the election of his successor as herein provided, it shall be filled by appointment of the board of trustees. Every such corporation shall at all times keep at its principal place of business in this state an officer or officers, agent or agents, upon whom service of legal process may be made in conformity with the law: Provided, that service of such process may be made at any time upon any resident trustee of such corporation. [Laws 1895, § 1, p. 61; Cd. 1881, § 2425; 1 H. C., § 1502; Bal., § 4255.]

Articles of incorporation cannot confer greater power than the statute authorizes. (Spokane v. Amsterdamsch Trustees, 22 Wash. 172, 60 Pac. 141; Parsons v. Tacoma Smelting Co., 25 Wash. 492, 65 Pac. 765.)

Lease of corporate property voidable at complaint of stockholder when one of the trustees of the lessor company necessary to constitute majority required by statute also interested in lessee company. (Parsons v. Tacoma Smelting & Refining Co., 25 Wash. 492, 65 Pac. 765.)

A stockholder has no right against a trustee to the possession or control of corporate property. (Oudin & Bergman etc. Min. Co. v. Conlan, 34 Wash. 216, 75 Pac. 798.)

An action by a stockholder and creditor against another stockholder and officer of company which was not a party to restrain fraudulent sale maintainable, complaint not demurrable. (Cross v. Johnson, 20 Wash. 124, 54 Pac. 1000.)

After a corporation has ceased to do business, a trustee having ceased to be such is no longer in a fiduciary position, and may purchase outstanding obligations of the corporation and enforce them for his own benefit. (Stanton v. Gilpin, 38 Wash. 191, 80 Pac. 290.)

Trustee cannot recover for services within his duties as trustee unless there is some provision therefor other than by the trustees. (Burns v. Commencement Bay Land Co., 4 Wash. 558, 30 Pac. 668, 709.)

Corporation held estopped to question validity of purchase of its own shares of stock, money having been paid and no question raised for two years. (Miller v. Washington Southern R. Co., 11 Wash. 414, 39 Pac. 673.)

A corporation may take its own stock in payment of debt if transaction bona fide. (Barto v. Nix, 15 Wash. 563, 46 Pac. 1033.)

A claim owned by a corporation sufficiently assigned by officers owning practically all the stock of the company. (Glover v. Rochester-German Ins. Co., 11 Wash. 143, 39 Pac. 380.)

Mortgage given by one corporation to another, the same person being president of both, not necessarily fraudulent for that reason. (Roy & Co. v. Scott, Hartley & Co., 11 Wash. 399, 39 Pac. 679.)

Where a company for two years makes no move to rescind a sale of real estate by an officer without authority, the company is bound. (Coolidge v. Schering, 32 Wash. 557, 73 Pac. 682.)

A corporation accepting and retaining benefits of transactions is estopped from denying authority of the officers making the transaction. (Dexter Horton & Co. v. Long, 2 Wash. 435, 27 Pac. 271; Allen v. Olympia Light & Power Co., 13 Wash. 307, 43 Pac. 55; Windsor v. St. Paul Min. R. Co., 37 Wash. 156, 79 Pac. 613; Leslie v. Wilshire, 6 Wash. 282, 33 Pac. 505.)

A contract may be ratified by an admission of its execution in a pleading. (Tingley v. Bellingham Bay Boom Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055.)

Statute that powers of corporation shall be exercised by directors does not exclude acts by agents authorized or ratified by stockholders directly. (Kirwin v. Washington Match Co., 37 Wash. 285, 79 Pac. 928.)

Circumstances may show ratification by corporation. (Austin v. Elk Mercantile Co., 38 Wash. 365, 80 Pac. 525.)

Proof of implied authority of officers of corporation to execute negotiable paper must be clear. (Elwell v. Puget Sound & Chehalis R. Co., 7 Wash. 487, 35 Pac. 376.)

Where indorsement of promissory note by corporation payee is regular in form, it raises presumption of authority. (Citizens' Nat. Bank of Tacoma v. Wintler, 14 Wash. 558, 45 Pac. 38.)

Transfer of property by insolvent company, while fraudulent preference, will not warrant attachment of the property. (Holbrook v. Peters & Miller Co., 8 Wash. 344, 36 Pac. 256.)

Insolvency of corporation does not alone make sale by it fraudulent. (Mayer v. Woolery, 10 Wash. 354, 39 Pac. 135; Roberts v. Washington Nat. Bank, 11 Wash. 550, 40 Pac. 225.)

Directors of insolvent corporation are trustees of assets for creditors. (Potvin v. Denny Hotel Co., 26 Wash. 309, 66 Pac. 376; Tacoma Ledger Co. v. Western Home Assn., 37 Wash. 467, 79 Pac. 992.)

Mortgage of property by insolvent company to trustee to secure indebtedness, the company to continue in possession, voidable by creditors. (Thompson v. Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25.)

Chattel mortgage by insolvent corporation not necessarily held void. (Leslie v. Wilshire, 6 Wash. 282, 33 Pac. 505.)

Mortgage by insolvent corporation by way of voluntary preference is void as to creditors. (Biddle Purchasing Co. v. Pt. Townsend Steel Co., 16 Wash. 681, 48 Pac. 407; Cook v. Moody, 18 Wash. 114, 50 Pac. 1020; Van Brocklin v. Queen City Print Co., 19 Wash. 552, 53 Pac. 822.)

Creditor who has consented and received benefit estopped from asserting mortgage by insolvent company void. (Bank of California v. Puget Sound Loan & T. Co., 20 Wash. 636, 56 Pac. 395.)

Mortgage not fraudulent where company solvent at time of its being made, though it subsequently became insolvent. (Strohl v. Seattle Nat. Bank, 25 Wash. 28, 64 Pac. 916.)

Property of insolvent corporation is trust fund for creditors and a voluntary preference is void. (Mitchell v. Jordan, 36 Wash. 645, 79 Pac. 311; Allen v. Baxter, 42 Wash. 434, 85 Pac. 26; McKay v. Elwood, 12 Wash. 579, 41 Pac. 919; Compton v. Swabacher Bros. & Co., 15 Wash. 306, 46 Pac. 338; Washington Liquor Co. v. Alladio Cafe Co., 28 Wash. 176, 68 Pac. 444; Wilson v. Book, 13 Wash. 676, 43 Pac. 939; Watterson v. Masterson, 15 Wash. 511, 46 Pac. 1041; Carrol v. Pacific Nat. Bank, 19 Wash. 639, 54 Pac. 32; Burrell v. Bennett, 20 Wash. 644, 56 Pac. 375; Stewart v. Gould, 8 Wash. 367, 36 Pac. 277; Smith v. Hopkins, 10 Wash. 77, 38 Pac. 854.)

Transfer of property by insolvent corporation at its full value not fraudulent preference. (Klosterman v. Mason County etc. R. Co., 8 Wash. 281, 36 Pac. 136.)

Remedy of creditor in case of fraudulent transfer by insolvent company is by complaint in equity to subject all assets to equal distribution. (Holbrook v. Peters & Miller Co., 8 Wash. 344, 36 Pac. 256; Wooding v. Wooding Co., 10 Wash. 531, 39 Pac. 137; Allen v. Stall-

cup, 13 Wash. 631, 43 Pac. 884; Sligh v. Shelton Southwestern R. Co., 20 Wash. 16, 54 Pac. 763.)

Insolvent company may make common-law assignment for benefit of creditors. (Nyman v. Berry, 3 Wash. 734, 29 Pac. 557; McKay v. Elwood, 12 Wash. 579, 41 Pac. 919; Cerf, Schloss & Co. v. Wallace, 14 Wash. 249, 44 Pac. 264.)

Receiver is entitled to possession of assets as against assignee. (Oleson v. Bank of Tacoma, 15 Wash. 148, 45 Pac. 734.)

Receiver may be appointed for insolvency of corporation under Ballinger's Code, section 5456. (Washington Liquor Co. v. Alladio Cafe Co., 28 Wash. 176, 68 Pac. 444; Davis v. Edwards, 41 Wash. 480, 84 Pac. 22; Thompson v. Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; New York Nat. Exch. Bank v. Met. Sav. Bank, 28 Wash. 553, 68 Pac. 905; Oleson v. Bank of Tacoma, 15 Wash. 148, 45 Pac. 734; State ex rel. Strohl v. Superior Court, 20 Wash. 545, 56 Pac. 35.)

Receiver may be appointed for fraud, waste or maladministration of assets. (Cameron v. Groveland Imp. Co., 20 Wash. 169, 54 Pac. 1128; Fernald v. Spokane & B. C. Tel. Co., 31 Wash. 672, 72 Pac. 462.)

Appointment of receiver does not oust sheriff in actual possession and not made party. (State ex rel. Hunt v. Superior Ct., 8 Wash. 210, 35 Pac. 1087; State ex rel. Shelly v. Superior Court, 8 Wash. 659, 35 Pac. 1092; State ex rel. Perkins v. Graham, 9 Wash. 528, 36 Pac. 1085.)

Appointment of receiver does not work dissolution of corporation. (Allen v. Olympia Light & Power Co., 13 Wash. 307, 43 Pac. 55.)

Receiver of insolvent company is trustee for stockholders and creditors. (Thompson v. Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067; Wilson v. Book, 13 Wash. 676, 43 Pac. 939; Watterson v. Masterson, 15 Wash. 511, 46 Pac. 1041; Mitchell v. Jordan, 36 Wash. 645, 79 Pac. 311.)

Where a mining company was formed to "buy, sell and deal in" mines, the trustees may sell all the property and assets of the company against objection of minority stockholders, since such sale is within the corporate purposes of the company. (Lange v. Reservation Min. & Smelting Co., 48 Wash. 167, 93 Pac. 208.)

A corporation held bound by the sale of its land by the president as his individual property where he owned all but two shares of the stock. (Roberts v. Hilton Land Co., 45 Wash. 464, 88 Pac. 946.)

A trustee receiving individually part of the consideration for the sale of the corporate assets is liable to creditors of the company. (Carstens & Earles v. Hofius, 44 Wash. 456, 87 Pac. 631.)

Director cannot recover for services rendered the corporation unless clearly outside his ordinary duties and there is clear understanding that the services are to be paid for. (Dial v. Inland Logging Co., 52 Wash. 81, 100 Pac. 157.)

Where syndicate of officers and stockholders purchased a competing business and resold it to the company at a profit, there being no fraud,

a minority stockholder who had waived any objections held estopped from maintaining suit to set aside the transaction. (Baker v. Seattle-Tacoma Power Co., 61 Wash. 578, 112 Pac. 647.)

In suit by stockholders it is unnecessary to show demand for corporate action where such demand would be useless. (Williams v. Erie Mountain Consol. Min. Co., 47 Wash. 360, 91 Pac. 1091.)

Equity will not entertain suit by stockholders to set aside corporate contract where it is not shown that redress within the corporation was sought nor excuse shown for failure so to do. (Elliott v. Puget Sound Wood Products Co., 52 Wash. 637, 101 Pac. 228.)

Stockholder's proxy binds the owner in the absence of fraud. (Baker v. Seattle Tacoma Power Co., 61 Wash. 578, 112 Pac. 647.)

Complaint by minority stockholders for "freeze-out" demurrable where they fail to show that they have exhausted their remedies within the company nor excuse such failure. (Seattle & Northern R. Co. v. Bowman, 53 Wash. 416, 102 Pac. 27.)

Minority stockholder cannot object to action of majority intra vires and not fraudulent. (Theis v. Spokane Falls Gaslight Co., 49 Wash. 477, 95 Pac. 1074.)

Promoter's contract afterward adopted by the company is binding upon it. (Chilcott v. Wash. State Colonization Co., 45 Wash. 148, 88 Pac. 113.)

Provision in contract that one party may vote another's stock is valid. (Winsor v. Commonwealth Coal Co., 63 Wash. 62, 114 Pac. 908.)

A corporation not able to pay its debts in due course is insolvent. (Nixon v. Hendy Machine Works, 51 Wash. 419, 99 Pac. 11.)

A corporation taking over the assets of another company, knowing it to be unable to pay its creditors, assumes the obligations of such insolvent corporation. (Carstens & Earles v. Hofius, 44 Wash. 456, 87 Pac. 631.)

That the assets of an insolvent corporation are a trust fund for creditors does not affect the sale under a mortgage given when the company was solvent. (Boyes v. Turk Min. Co., 56 Wash. 515, 106 Pac. 475.)

Purchase of corporate assets by part of stockholders not fraud per se. (Boyes v. Turk Min. Co., 56 Wash. 515, 106 Pac. 475.)

While knowledge of a single officer not imputable to the corporation, it may put the trustees on inquiry and so constitute notice. (Poultry Producers' Union v. Williams, 58 Wash. 64, 107 Pac. 1040.)

§ 408. May Hold, Own and Vote Stock of Other Companies.

[§ 3684, Rem.–Bal.] That any corporation heretofore or hereafter organized under the laws of this state or of any other state or territory of the United States and doing business in this state shall have power and authority to subscribe for, acquire by purchase or otherwise, and to own, hold, sell,

assign and transfer shares of the capital stock of any other corporation and by its duly authorized officer or proxy to vote such shares at any and all stockholders' meetings of the corporation whose shares are so held and to have and exercise all the rights, powers and privileges of any other stockholder, except that such corporate owner cannot be a member of the board of trustees. All existing holdings by any such corporation in the shares of the capital stock of any other corporation are hereby validated. [Laws 1905, § 1, c. 27, p. 51.]

Articles of incorporation cannot confer greater power than the statute authorizes. (Spokane v. Amsterdamsch, 22 Wash. 172, 60 Pac. 141; Parsons v. Tacoma Smelting Co., 25 Wash. 492, 65 Pac. 765.)

Though authorized by the articles of incorporation to own stock in other companies, a company owning such stock cannot vote it in absence of statutory authority. (Parsons v. Tacoma Smelting & Refining Co., 25 Wash. 492, 65 Pac. 765.)

Corporation held estopped to question validity of purchase of its own shares of stock, money having been paid and no question raised for two years. (Miller v. Washington Southern R. Co., 11 Wash. 414, 39 Pac. 673.)

A corporation may take its own stock in payment of debt if transaction bona fide. (Barto v. Nix, 15 Wash. 563, 46 Pac. 1033.)

Laws of 1905, page 51, authorizing corporations to own and hold stock in other corporations is constitutional. (State ex rel. McIntosh v. Superior Court, 56 Wash. 214, 105 Pac. 637.)

Banks may not hold stock in other banks. (Rem.-Bal., sec. 3224.)

§ 409. Lapse of Election of Trustees.

[§ 3687, Rem.–Bal.] If it shall happen at any time that an election of trustees shall not be made on the day designated by the by-laws of the company, the corporation shall not, for that reason, be dissolved; but it shall be lawful on any other day to hold an election for trustees, in such manner as shall be provided for in the by-laws of the company, and all acts of the trustees shall be valid and binding upon the company until their successors are elected and qualified. [Laws 1873, § 6, p. 400; Cd. 1881, § 2426; 1 H. C., § 1503; Bal., § 4256.]

§ 410. Quorum.

[§ 3688, Rem.–Bal.] A majority of the whole number of trustees shall form a board for the transaction of business,

and every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act. [Laws 1873, § 7, p. 401; Cd. 1881, § 2427; 1 H. C., § 1504; Bal., § 4257.]

§ 411. Meetings, Where Held.

[§ 3690, Rem.–Bal.] Meetings of the stockholders of a corporation shall be held at its principal place of business within this state. Meetings of the board of trustees or directors of corporations, organized and existing under the laws of this state, may be held at such place or places within or without the state as may be designated in the articles of incorporation or by-laws. In case the meetings of the board of directors or trustees of a corporation shall be held outside of the state of Washington, either the original or full and complete copies or duplicate of all proceedings had at such meeting or meetings certified by the secretary under the corporate seal shall be sent to and kept at the principal office or place of business of the corporation in this state and shall be part of the records of the corporation in this state. [Laws 1907, § 1, p. 205.]

A stockholder cannot bring action against third parties for wrong done the corporation where the corporation has not refused to act. (Ninneman v. Fox, 43 Wash. 43, 86 Pac. 213.)

A stockholder may not intervene in a suit affecting the company as such unless the company refuses, and such intervention is clearly necessary to protect the stockholders' rights. (Bissell v. Taylor, 7 Wash. 324, 35 Pac. 68.)

§ 412. First Meeting—Notice, etc.

[§ 3689, Rem.–Bal.] The first meeting of the trustees shall be called by a notice, signed by one or more persons named as trustees in the certificate, setting forth the time and place of meeting, which notice shall be delivered personally to each trustee, or published at least twenty days in some newspaper in the county in which the principal place of business of the corporation, or if no newspaper is published in the county, then in some newspaper nearest thereto in the state. [Laws 1873, § 8, p. 401; Cd. 1881, § 2428; 1 H. C., § 1505; Bal., § 4258.]

Proof of notice of meeting may be made other than by its records. (Budd v. Co., 2 Wash. Ter. 347.)

§ 413. Stock Personal Estate—Transfer of.

[§ 3693, Rem.–Bal.] The stock of the company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no transfer shall be valid except between the parties thereto, until the same shall have been entered upon the books of the company, so as to show the names of the parties, by and to whom transferred, the numbers and designation of the shares, and the date of the transfer. [Laws 1873, § 9, p. 401; Cd. 1881, § 2429; 1 H. C., § 1506; Bal., § 4261.]

One who purchases stock with agreement to sell it back becomes a stockholder on receiving the stock, as distinguished from debtor and creditor relation. (Yeaton v. Eagle Oil & Refining Co., 4 Wash. 183, 29 Pac. 1051.)

Purchase and sale of stock may be rescinded for fraud. (Mulholland v. Wash. Match Co., 35 Wash. 315, 77 Pac. 497; Krisch v. Interstate Fisheries Co., 39 Wash. 381, 81 Pac. 855.)

A transfer of stock not registered is binding between the parties under Code of 1882, section 2429, and passes title against a subsequent purchaser on execution sale against transferrer. (Port Townsend Nat. Bank v. Port Townsend etc. Co., 6 Wash. 597, 34 Pac. 155; Dearborn v. Washington Sav. Bank, 18 Wash. 8, 50 Pac. 575.)

Where no stock register is kept, transfer on records of company according to custom of the company binds the company. (Stewart v. Walla Walla P. & P. Co., 1 Wash. 521, 20 Pac. 605.)

Stock in a corporation may be garnished and sold to the extent of the judgment debtor's interest. (Hardin v. White Swan Min. etc. Co., 26 Wash. 583, 67 Pac. 236.)

A company may waive provision under Ballinger's Code, section 4261, that transfer of stock is void until entered in books of company. (Van Horn v. New Western Shingle Co., 54 Wash. 117, 103 Pac. 42.)

Undisclosed owner of stock standing in the name of another not entitled to notice of stockholders' meeting. (Wright v. Tacoma Gas & Elec. Light Co., 53 Wash. 262, 101 Pac. 865.)

A corporation held entitled to have spurious stock fraudulently issued by the secretary canceled. (Dreyfus Min. Co. v. Willard, 46 Wash. 345, 89 Pac. 935.)

Where stock is assigned and certificate issued to another than designated owner, the company cannot forfeit the stock for failure of vendor to pay subscription. (Falk v. Schmitz etc. Min. Co., 44 Wash. 612, 87 Pac. 927.)

Where the company kept only stock certificate and stub-book but no transfer or record book, held company and others bound by record of stock transfer as shown by the record actually kept. (Iverson v. Bradrick, 54 Wash. 633, 104 Pac. 130.)

§ 414. Subscriptions, Assessments, Sale of Shares, etc.

[§ 3694, Rem.–Bal.] The stockholders of any corporation formed under this chapter may, in the by-laws of the company, prescribe the times, manner and amounts in which payments of the sum subscribed by them respectively, shall be made; but in case the same shall not be so prescribed, the trustees shall have the power to demand and call in from the stockholders the sums by them subscribed, at such time, and in such manner, payments or installments, as they may deem proper. In all cases notice of each assessment shall be given to the stockholders personally, or by publication in some newspaper published in the county in which the principal place of business of the company is located; and if none be published in such county, then in the newspaper nearest to said principal place of business in the state. If after such notice has been given any stockholders shall make default in the payment of assessments upon the shares held by him, so many of said shares may be sold as will be necessary for the payment of the assessment upon all the shares held by him, her or them. The sale of said shares shall be made as prescribed in the by-laws of the company, but shall in no case be made at the office of the company. No sale shall be made except at public auction, to the highest bidder, after a notice of four weeks, published as above directed in this section, and at such sale the person who shall pay the assessment so due, together with the expenses of advertising and sale for the smallest number of shares, or portion of a share, as the case may be, shall be deemed the highest bidder. Provided, that the amount of the capital stock of any bank incorporated under this act shall not be less than twenty-five thousand dollars, to be divided into shares of one hundred dollars each, all of which shares shall be subscribed, and three-fifths of such capital stock shall be paid in before commencement of business, the remainder to be subject to the

call of the trustees, and it shall be the duty of the directors of any such bank to file with their articles of incorporation their affidavit that three-fifths of the capital stock of such bank has been actually paid in. [Cd. 1881, § 2430; 1 H. C., § 1507; Bal., § 4262.]

As to banks, modified by Rem.-Bal., sec. 3317.

Laws of 1886, page 84, amending Code of 1881, section 2421, providing forfeiture of stock for failure to pay subscriptions, does not relieve from liability for unpaid subscriptions by limiting remedy to forfeiture. (Puget Sound & Chehalis R. Co. v. Ouellette, 7 Wash. 265, 34 Pac. 929.)

Joint subscription by trustees to complete subscription enforceable contract. (Hardin v. Sweeney, 14 Wash. 129, 44 Pac. 138; Hardin v. Mullen, 16 Wash. 647, 48 Pac. 349.)

Part payment of subscription does not stop subscribers from denying authority of corporation to sue. (Denny Hotel Co. v. Gilmore, 6 Wash. 152, 32 Pac. 1004.)

Subscribers to stock of company which has begun business before all its stock is subscribed not liable on the subscriptions unless they have by their acts and conduct waived the conditions. Part payment of subscriptions without notice not a waiver. (Birge v. Browning, 11 Wash. 249, 39 Pac. 643.)

A subscription to capital stock not enforceable until the entire capital stock is subscribed. (Denny Hotel Co. v. Schram, 6 Wash. 134, 32 Pac. 1002; Denny Hotel Co. v. Gilmore, 6 Wash. 152, 32 Pac. 1004; Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089.)

Property may be taken in payment for a stock subscription. (Manhattan Trust Co. v. Seattle Coal & Iron Co., 16 Wash. 499, 48 Pac. 333, 737; Kroenert v. Johnston, 19 Wash. 96, 52 Pac. 605.)

Property taken in payment of stock must be fairly valued and stockholder's valuation is not conclusive. (Dunlap v. Rauch, 24 Wash. 620, 64 Pac. 807; Manhattan Trust Co. v. Seattle Coal & Iron Co., 19 Wash. 493, 53 Pac. 951.)

"Calls" and "assessments" are used interchangeably. (Stewart v. Walla Walla etc. Pub. Co., 1 Wash. 521, 20 Pac. 605.)

Notice of assessment must be given before suit brought on unpaid subscription. (Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089.)

A prior call unnecessary where the action is by creditors of an insolvent corporation or after an assignment for the benefit of creditors. (Adamant Mfg. Co. v. Wallace, 16 Wash. 614, 48 Pac. 415; McKay v. Elwood, 12 Wash. 579, 41 Pac. 919.)

A subscription may be enforced as a contract for payment of money and the shares sold under execution. (Code of 1881, secs. 2421, 2430; Puget Sound & C. R. R. Co. v. Ouellette, 7 Wash. 265, 34 Pac. 929; Dearborn v. Washington Sav. Bank, 18 Wash. 8, 50 Pac. 575.)

Complaint to recover stock subscription not demurrable for failure to allege entire stock subscribed. (McKay v. Elwood, 12 Wash. 579, 41 Pac. 919.)

Stock must be paid for in money or money's worth. (Turner v. Bailey, 12 Wash. 634, 42 Pac. 115; Adamant Mfg. Co. v. Wallace, 16 Wash. 614, 48 Pac. 415.)

Under the provisions of 1 Hill's Code, section 1507, shares of stock cannot be sold for nonpayment of assessments unless so provided in the by-laws. (Dearborn v. Washington Savings Bank, 18 Wash. 8, 50 Pac. 575.)

Where fully paid stock is issued for property, there must be actual fraud to enable creditors to call stockholders to account as for unpaid subscriptions. (Turner v. Bailey, 12 Wash. 634, 42 Pac. 115.)

A purchase of stock may be rescinded for fraud and the defrauded stockholder is not estopped by attending a stockholders' meeting and voting the stock. (Landis v. Wintermute, 40 Wash. 673, 82 Pac. 1000.)

In case of pledge of stock, the corporation must proceed against the pledgor for any unpaid subscriptions, and the corporation transfers the stock without requiring the production of the outstanding certificate at its peril. (Brown v. Union Sav. & Loan Assn., 28 Wash. 657, 69 Pac. 383.)

Subscriber to stock of corporation who has bona fide transferred his shares, the transfer being registered, is not liable for an assessment afterward made. (Stewart v. Walla Walla etc. Pub. Co., 1 Wash. 521, 20 Pac. 605.)

Corporations have no common-law lien upon their stock for the debts of their stockholders, nor does the code give lien—1 Hill's Code, sec. 1507; Bal. Code, sec. 4262. (Dearborn v. Washington Sav. Bank, 18 Wash. 8, 50 Pac. 575.)

Liability for unpaid subscriptions, under Code of 1881, section 2434, is declaratory of the common law securing a trust fund for creditors that can be reached only by an equitable action. (Burch v. Taylor, 1 Wash. 245, 24 Pac. 438.)

An action by a creditor to enforce unpaid subscriptions is in the nature of a creditor's bill, and it is unnecessary first to obtain judgment against the company where so doing would be simply futile and the cause of action accrues at the time the corporation is declared insolvent. (Chilberg v. Siebenbaum, 41 Wash. 663, 84 Pac. 598.)

Stock subscriptions must be fully paid in property or cash, irrespective of understandings among the stockholders. (Adamant Mfg. Co. v. Wallace, 16 Wash. 614, 48 Pac. 415.)

When stock is fully paid by property at its fair valuation, the stockholders do not become subsequently liable by the subsequent depreciation of the property. (Turner v. Bailey, 12 Wash. 634, 42 Pac. 115.)

The fact that a stock certificate purports on its face to be fully paid is not conclusive. (Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089.)

Receiver of insolvent corporation may enforce all the rights that the creditors have. (Cole v. Satsop R. Co., 9 Wash. 487, 37 Pac. 700.)

Where a subscription to stock is made by a "trustee" or agent for others, it may be enforced against the real parties. (Cole v. Satsop, 9 Wash. 487, 37 Pac. 700.)

A stockholder owning a majority of stock by way of security for advances made by him to the company is nevertheless a stockholder to answer obligations of creditors. (Mitchell v. Jordan, 36 Wash. 645, 79 Pac. 311.)

In an action by a receiver of an insolvent company, defendant may set off contract claim against the company existing at time of commencement of action. (Sheafe v. Hastie, 16 Wash. 563, 48 Pac. 246.)

Notice of assessment required by 1 Hill's Code, section 1507 (1 Bal. Code, sec. 4262), must be given when assessment made by court as well as otherwise. (Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089.)

Stockholders cannot escape liability to creditors for unpaid subscriptions on the ground that part of the stock was illegally subscribed. (Cole v. Satsop R. Co., 9 Wash. 487, 37 Pac. 700.)

That all the capital stock was never subscribed is a good defense to an action on a stock subscription. (Birge v. Browning, 11 Wash. 249, 39 Pac. 643.)

That no call was made prior to an assignment to a trustee is no defense to an action by a trustee to enforce unpaid subscriptions. (McKay v. Elwood, 12 Wash. 579, 41 Pac. 919.)

A judgment for contingent liability over the par value of stock is no bar to action for unpaid subscriptions. (Barto v. Nix, 15 Wash. 563, 46 Pac. 1033.)

Complaint in action for unpaid subscriptions failing to allege defendant had notice of the call for assessments is demurrable under 1 Hill's Code, section 1507 (1 Bal. Code, sec. 4262). (Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089.)

Dividends are to be declared on unpaid as well as paid-up stock in compliance with by-laws. (Gellerman v. Atlas Foundry & Machine Co., 45 Wash. 114, 87 Pac. 1059.)

Agreement that a stockholder was to receive his stock "free of assessment" does not mean free from payment therefor. (Cunningham v. Independence Consol. Min. Co., 58 Wash. 371, 108 Pac. 956.)

Change in name of company does not release subscribers to stock. (Cox v. Dickie, 48 Wash. 264, 93 Pac. 523.)

Stock issued to promoters for property not canceled in absence of actual fraud. (Inland Nursery & Floral Co. v. Rice, 57 Wash. 67, 106 Pac. 499.)

Where a receiver of an insolvent corporation sues for unpaid subscriptions, it is no defense that the stockholder took the stock bona

fide, believing it fully paid. (Cox v. Dickie, 48 Wash. 264, 93 Pac. 523.)

A promoter's contract binding the corporation inequitably not enforceable. (Hampton v. Buchanan, 51 Wash. 155, 98 Pac. 374; Mangold v. Adrian Irr. Co., 60 Wash. 286, 111 Pac. 173.)

§ 415. Executor may Vote Stock.

[§ 3695, Rem.–Bal.] Whenever any stock is held by a person as executor, administrator, guardian, or trustee, he shall represent such stock at all meetings of the company, and may vote accordingly as a stockholder. [Laws 1873, § 11, p. 402; Cd. 1881, § 2431; 1 H. C., § 1508; Bal., § 4263.]

§ 416. Pledge of Stock, Effect of.

[§ 3696, Rem.–Bal.] Any stockholder may pledge his stock by a delivery of the certificates or other evidence of his interest, but may, nevertheless, represent the same at all meetings, and vote as a stockholder. [Laws 1873, § 12, p. 402; Cd. 1881, § 2432; 1 H. C., § 1509; Bal., § 4264.]

§ 417. Dividends—Capital Stock, How Reduced—Liabilities of Trustees.

[§ 3697, Rem.–Bal.] It shall not be lawful for the trustees to make any dividend except from the net profits arising from the business of the corporation, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock of the company unless in the manner prescribed in this chapter, or the articles of incorporation or by-laws; and in case of any violation of the provisions of this section, the trustees under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the board of directors at the time, or were not present when the same did happen, shall, in their individual or private capacities, be jointly or severally liable to the corporation, and the creditors thereof in the event of its dissolution, to the full amount so divided, or reduced, or paid out: Provided, that this section shall not be construed to prevent a division and distribu-

tion of the capital stock of the company, which shall remain after the payment of all its debts upon the dissolution of the corporation or the expiration of its charter. [Laws 1873, § 13, p. 402; Cd. 1881, § 2433; 1 H. C., § 1510; Bal., § 4265.]

A by-law providing for certain dividends has force of a contract. (Seattle Trust Co. v. Pittner, 18 Wash. 401, 51 Pac. 1048.)

Under Ballinger's Code, section 4265, it is unlawful to reduce the capital stock by paying any portion of it to the stockholders. (Tait v. Pigott, 32 Wash. 344, 73 Pac. 364, 38 Wash. 59, 80 Pac. 172; Tacoma Ledger Co. v. Western Home Bldg. Co., 37 Wash. 467, 79 Pac. 992.)

Stockholder has no right to profits in the treasury of the company until declared as dividends. (Seattle Trust Co. v. Pittner, 18 Wash. 401, 51 Pac. 1048.)

Where the property of an insolvent company has been transferred to a director to avoid claims of creditors, the sale may be set aside by a creditor. (Potvin v. Denny Hotel Co., 26 Wash. 309, 66 Pac. 376.)

Record of by-law as to past dividends cannot be changed after purchase of stock to detriment of such purchaser. (Gellerman v. Atlas Foundry & Machine Co., 45 Wash. 114, 87 Pac. 1059.)

Dividends are to be declared on unpaid as well as paid-up stock in compliance with by-laws. (Gellerman v. Atlas Foundry & Machine Co., 45 Wash. 114, 87 Pac. 1059.)

Trustee's individual liability noticed. (American Radiator Co. v. Kinnear, 56 Wash. 210, 214, 105 Pac. 630, 631.)

§ 418. Power to Issue Negotiable Paper.

[§ 3698, Rem.–Bal.] No corporation organized under this chapter shall, by any implication or construction, be deemed to possess the power of issuing bills, notes, or other evidence of debt for circulation as money, except bonds by railroad companies, which shall at no time exceed double the amount of paid-up stock issued by said company. Each and every stockholder shall be personally liable to the creditors of the company, to the amount of what remains unpaid upon his subscription to the capital stock, and not otherwise: Provided, that the stockholders of every bank incorporated under this act or the territory of Washington shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association accruing while they remain such stockholders,

to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such shares, and all such banking corporations shall file, on the first Monday in June, each year, with the state auditor, a report sworn to by its president, vice-president, or cashier, of the resources and liabilities, stating the amount of deposits, the aggregate of loans and the amount upon each class of securities, the names and residences of the shareholders and number of their shares, the directors or officers for the time being, and any other matters affecting the safety of their deposits or the interest of their creditors; and such banking corporations shall have power to exercise, by its board of trustees, or duly authorized officers or agents, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt; by receiving deposits, buying and selling exchange, coin and bullion, by loaning money on real estate or personal security; to accept and execute all trusts, fiduciary or otherwise, as may be committed to such bank or corporation, by any person, persons or corporation, or by the order or direction of any court, and may do any other business pertaining to banking. [See Laws 1911, c. 80.] Provided further, that the provisions of this section shall not apply to the debentures or bonds of any company duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers of said debentures or bonds, such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon the unencumbered real estate worth at least twice the amount loaned thereon: Provided further, however, that such issue of debentures or bonds shall in no case exceed ten times the capital stock of the issuing corporation. [Laws 1888, § 1, p. 65; Cd. 1881, § 2434; 1 H. C., § 1511; Bal., § 4266.]

Coal mining is not within section 34, and where property in a coal mine is knowingly taken by the company at overvaluation for stock,

stockholder is liable to creditor for amount unpaid on subscription. (Davies v. Ball, 64 Wash. 292, 116 Pac. 833.)

§ 419. Liability of Executor, etc., Holding Stock as Collateral.

[§ 3700, Rem.–Bal.] No person holding stock as executor, administrator, guardian, or trustee, or holding it as collateral security or in pledge, shall be personally subject to any liability as a stockholder of the company; but the person pledging the stock shall be considered as holding the same, and shall be liable as a stockholder, and the estate and funds in the hands of the executor, administrator, or guardian or trustee shall be liable in like manner and to the same extent as the testator or intestate, or the ward or person interested in the trust fund would have been if he or she had been living and competent to act and hold the stock in his or her name. [Laws 1873, § 15, p. 403; Cd. 1881, § 2435; 1 H. C., § 1512; Bal., § 4268.]

In case of pledge of stock, the corporation must proceed against the pledgor for any unpaid subscriptions, and the corporation transfers the stock without requiring the production of the outstanding certificate at its peril. (Brown v. Union Sav. & Loan Assn., 28 Wash. 657, 69 Pac. 383.)

Interest of pledgee of stock cannot be divested by execution sale against pledgor or owner. (Port Townsend Nat. Bank v. Port Townsend etc. Co., 6 Wash. 597, 34 Pac. 155.)

The remedy of the pledgee is to foreclose the pledge. (Port Townsend Nat. Bank v. Port Townsend etc. Co., 6 Wash. 597, 34 Pac. 155; American Bonding etc. Co. v. Pacific Brewing Co., 34 Wash. 10, 74 Pac. 826.)

Pledgor of stock entitled to vote it. (Spokane v. Amsterdamsch Trustees Kantoor, 22 Wash. 172, 60 Pac. 141.)

Pledgee of stock who has reduced his lien to judgment not entitled to possession of the certificate of stock, which should remain with the clerk of court until redemption or sale. (American Bonding Co. v. Loeb, 50 Wash. 104, 96 Pac. 692.)

Pledgee of stock standing in his name as owner on the books of the company not liable for unpaid subscriptions. (Johnstone v. Black, 59 Wash. 144, 109 Pac. 367.)

Stockholder of insolvent corporation who transferred his stock while the company was solvent relieved of liability. (Iverson v. Bradrick, 54 Wash. 633, 104 Pac. 130.)

§ 420. Record of Stockholders—Inspection.

[§ 3701, Rem.–Bal.] It shall be the duty of the trustees of every company incorporated under this chapter to keep a book containing the names of all persons, alphabetically arranged, who are or shall be stockholders of the corporation, and showing the number of shares of stock held by them respectively, and the time when they became the owners of such shares, which book during the usual business hours of the day, on every day excepting Sunday and the legal holidays, shall be open for the inspection of stockholders and creditors of the company, at the office or principal place of business of the company; and any stockholder or creditor of the company shall have the right to make extracts from such book, or to demand and receive from the clerk or other officer having the charge of such book a certified copy of any entry therein, or to demand and receive from any clerk or officer a certified copy of any paper placed on file in the office of the company; and such book and certified copy shall be presumptive evidence of the fact therein stated in any action or proceeding against the company or any one or more of the stockholders. [Laws 1873, § 16, p. 403; Cd. 1881, § 2436; 1 H. C., § 1513; Bal., § 4269.]

A stockholder may enforce his right to inspect the books by mandamus proceedings, and the burden of showing that he is not proceeding in good faith is on the officers of the company. (State ex rel. Weinberg v. Pacific Brewing & Malting Co., 21 Wash. 451, 58 Pac. 584.)

A stockholder dealing with his corporation through an agent of the corporation is presumed to know the scope of the agent's authority. (Hardin v. Sweeney, 14 Wash. 129, 44 Pac. 138.)

Remington and Ballinger's Code, sections 3701, 3702, providing a penalty for failure to keep stock books open to inspection, is penal and construed strictly. (Brown v. Kildea, 58 Wash. 184, 108 Pac. 452, 1135.)

For inspection of books and papers of company, demand must be made by party having right to inspect "named book or designated paper." General demand to inspect "books and papers" not sufficient. (Brown v. Kildea, 58 Wash. 184, 108 Pac. 452, 1135.)

Where company kept only stock certificate and stock book, but no transfer or record book, held company and others bound by record

of stock transfer as shown by the record actually kept. (Iverson v. Bradrick, 54 Wash. 633, 104 Pac. 130.)

To subject officer to penalty there must be demand by person interested for designated papers. (Brown v. Kildea, 58 Wash. 184, 108 Pac. 452, 1135.)

§ 421. False Entries—Misdemeanors.

[§ 3702, Rem.–Bal.] If at any time the clerk or other officer having charge of such book shall make any false entry, or neglect to make any proper entry therein, or having the charge of any papers of the company shall refuse or neglect to exhibit the same, or allow the same to be inspected or extracts to be taken therefrom, or to give a certified copy of any entry, as provided in the preceding section, he shall be deemed guilty of a misdemeanor, and shall forfeit and pay to the injured party a penalty of not less than one hundred dollars nor more than one thousand dollars, and all damages resulting therefrom, to be recovered in any action of debt in any court having competent jurisdiction; and for neglecting to keep such book for inspection as aforesaid, the corporation shall forfeit to the people the sum of one hundred dollars for every day it shall so neglect, to be sued for and recovered in the name of the people in the superior court of the county in which the principal place of business of the corporation is located. [Laws 1873, § 17, p. 404; Cd. 1881, § 2437; 1 H. C., § 1514; Bal., § 4270.]

Corporations entitled to have spurious stock fraudulently issued by the secretary canceled. (Dreyfus Min. Co. v. Willard, 46 Wash. 345, 89 Pac. 935.)

To subject an officer to penalty there must be demand by the person interested for designated papers. (Brown v. Kildea, 58 Wash. 184, 108 Pac. 452, 1135.)

§ 422. Right of Stockholder in Mining Companies to Inspect Property.

[§ 7348, Rem.–Bal.] Any owner of stock to the amount of one thousand shares, in any corporation doing business under the laws of the state of Washington for the purposes of mining, shall at all hours of business or labor on or about the premises or property of such corporation, have the right

to enter upon such property and examine the same, either on the surface or underground. And it is hereby made the duty of any and all officers, managers, agents, superintendents, or persons in charge, to allow any such stockholder to enter upon and examine any of the property of such corporation at any time during the hours of business or labor; and the presentation of certificates of stock in the corporation of the amount of one thousand shares, to the officer or person in charge, shall be prima facie evidence of ownership and right to enter upon or into, and make examinations of the property of the corporation. [Laws 1901, § 1, p. 258.]

§ 423. Liability for Refusal to Comply.

[§ 7349, Rem.–Bal.] Any violation of any of the provisions of this act by any officer or agent of such corporation shall constitute a misdemeanor, and upon conviction thereof every such officer or agent shall be fined in a sum not greater than two hundred dollars for each offense. [Laws 1901, § 2, p. 259.]

§ 423a. Penalty for Failure to Furnish Statement.

[§ 7350, Rem.–Bal.] In case such corporation shall fail and neglect to furnish the statement provided for in section 1 [Rem.–Bal., § 7348], within sixty days from and after such demand, the franchise of said corporation may be annulled in any action brought by such stockholder in the name of the state of Washington, in any superior court in the county in which said mining property is situated or in which the principal place of business of the corporation may be located. [Laws 1901, p. 259, § 3.]

§ 424. Increase or Decrease of Capital Stock.

[§ 3704, Rem.–Bal.] Any company incorporated under this chapter may, by complying with the provisions herein contained, increase or diminish its capital stock to any amount which may be deemed sufficient and proper for the purposes of the corporation; but before any corporation shall be entitled to diminish the amount of its capital stock, if the amount of its debts and liabilities shall exceed the sum

to which the capital is proposed to be diminished, such amount shall be satisfied and reduced so as not to exceed the diminished amount of the capital: Provided, that the deposits in any trust company or banking corporation shall not be included in ascertaining the debts and liabilities of such trust company or banking corporation for the purposes of this section: Provided, further, that this act shall not relieve such trust company or banking corporation or the stockholders of any such trust company or banking corporation from liability, although contingent, or remote, incurred or entered into by such trust company or banking corporation prior to the reduction of its capital, including liability for deposits: Provided further, that before any banking corporation, or trust company, can reduce its capitalization, a notice, in writing, must be mailed to the last known post-office address of its depositors setting forth the fact that the said banking corporation, or trust company, intends to decrease its capitalization, showing the amount of its capitalization and the amount to which it intends to decrease same; and proof of the mailing of such notices shall be made by affidavit of the party mailing the same, showing the names and addresses of the persons to whom mailed. [Laws 1899, § 1, p. 174. See §§ 3326, 3697, Rem.–Bal.; Cd. 1881, § 2438; 1 H. C., § 1515; Bal., § 4271.]

§ 425. Notice of Meeting Called to Increase or Diminish Stock.

[§ 3705, Rem.–Bal.] Whenever it is desired to increase or diminish the amount of capital stock, a meeting of the stockholders shall be called, by a notice signed by at least a majority of the trustees, and published at least eight weeks in some newspaper published in the county where the principal place of business of the company is located, or if no newspaper is published in the county, then the newspaper nearest thereto in the state, which notice shall specify the object of the meeting, the time and place where it is to be held, and the amount to which it is proposed to increase or diminish the capital, and a vote of two-thirds of all the

shares of the stock shall be necessary to increase or diminish the amount of the capital stock. [Laws 1873, § 19, p. 404; Cd. 1881, § 2439; 1 H. C., § 1516; Bal., § 4272.]

§ 426. Certificate to be Made, Filed, etc.—Amount to be Specified.

[§ 3706, Rem.–Bal.] If, at a meeting so called, a sufficient number of votes have been given in favor of increasing or diminishing the amount of capital, a certificate of the proceedings showing a compliance with these provisions, the amount of capital actually paid in, the whole amount of debts and liabilities of the company and the amount to which the capital stock is to be increased or diminished, shall be made out, and signed, and verified, by the affidavit of the chairman and secretary of the meeting, certified to by a majority of the trustees, and filed as required by section 2 [§ 3679, Rem.–Bal.] and when so filed, the capital stock of the corporation shall be increased or diminished to the amount specified in the certificate. [Laws 1873, sec. 20, p. 405; Cd. 1881, § 2440; 1 H. C., § 1517; Bal., § 4273.]

§ 427. Powers of Trustees upon Dissolution of Corporation.

[§ 3707, Rem.–Bal.] Upon the dissolution of any corporation formed under the provisions of this chapter, the trustees at the time of the dissolution shall be trustees of the creditors and stockholders of the corporation dissolved, and shall have full power and authority to sue for and recover the debts and property of the corporation by the name of the trustees of such corporation, collect and pay outstanding debts, settle all its affairs, and divide among the stockholders the money and other property that shall remain after the payment of the debts and necessary expenses. [Laws 1873, § 21, p. 405; Cd. 1881, § 2441; 1 H. C., § 1518; Bal., § 4274.]

Section applicable to voluntary dissolutions. (Conlon v. Oudin, 49 Wash. 240.)

After a corporation has ceased to do business, a trustee having ceased to be such is no longer in a fiduciary position, and may purchase outstanding obligations of the corporation and enforce them for his own benefit. (Stanton v. Gilpin, 38 Wash. 191, 80 Pac. 290.)

After a corporation has ceased to do business and a trustee and director has ceased to be such, service on such person is not service on the corporation binding on other stockholders. (Stanton v. Gilpin, 38 Wash. 191, 80 Pac. 290.)

A trustee, long after the corporation has ceased doing business, may purchase notes and judgments against the company. (Stanton v. Gilpin, 38 Wash. 191, 80 Pac. 290.)

Mere fact that indebtedness exceeds assets no proof of insolvency of corporation. (Brooks v. Skookum Mfg. Co., 9 Wash. 80, 37 Pac. 284.)

Sufficiency of evidence of insolvency in particular cases. (Smith v. Hopkins, 10 Wash. 77, 38 Pac. 854; Conover v. Hull, 10 Wash. 673, 39 Pac. 166; State ex rel. Jenkins v. Equitable Indem. Assn., 18 Wash. 514, 52 Pac. 234.)

Subsequent insolvency does not affect prior transaction valid when made. (Bank of California v. Puget Sound Loan etc. Co., 20 Wash. 636, 56 Pac. 395.)

Code of 1881, chapter 143, applicable to discharge of insolvent debtor, does not apply to corporations. (Nyman v. Berry, 3 Wash. 734, 29 Pac. 557.)

Purchase money mortgage not fraudulent as to creditors. (Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396.)

Trustees act as trustees for stockholders and creditors to exclusion of receiver only in case of petition, under section 4275 of Ballinger's Code. (New York Nat. Bank v. Met. Sav. Bank, 28 Wash. 553, 68 Pac. 905.)

§ 428. Dissolution Proceedings.

[§ 3708, Rem.–Bal.] Any corporation formed under this chapter may dissolve and disincorporate itself by presenting to the superior judge of the county in which the office of the company is located a petition to that effect, accompanied by a certificate of its proper officers, and setting forth that at a meeting of the stockholders, called for the purpose, it was decided, by a vote of two-thirds of all the stockholders, to disincorporate and dissolve the corporation. Notice of the application shall then be given by the clerk, which notice shall set forth the nature of the application, and shall specify the time and place at which it is to be heard, and shall be published in some newspaper of the county once a week for eight weeks, or if no newspaper is published in the county, by publication in the newspaper nearest thereto in the state. At the time and place appointed, or at any other time to

which it may be postponed by the judge, he shall proceed to consider the application, and if satisfied that the corporation has taken necessary preliminary steps and obtained the necessary vote to dissolve itself, and that all claims against the corporation are discharged, he shall enter an order declaring it dissolved. [Laws 1873, § 22, p. 405; Cd. 1881, § 2442; 1 H. C., § 1519; Bal., § 4275.]

After a corporation has ceased to do business, a trustee having ceased to be such is no longer in a fiduciary position, and may purchase outstanding obligations of the corporation and enforce them for his own benefit. (Stanton v. Gilpin, 38 Wash. 191, 80 Pac. 290.)

After a corporation has ceased to do business and a trustee and director has ceased to be such, service on such person is not service on the corporation binding on other stockholders. (Stanton v. Gilpin, 38 Wash. 191, 80 Pac. 290.)

A trustee, long after the corporation has ceased doing business, may purchase notes and judgments against the company. (Stanton v. Gilpin, 38 Wash. 191, 80 Pac. 290.)

Decree of dissolution warranted where company shown to be insolvent. (State ex rel. Jenkins v. Equitable Indem. Co., 18 Wash. 514, 52 Pac. 234.)

Court has no jurisdiction to appoint receiver on quo warranto proceeding under 2 Hill's Code, section 689 (2 Bal. Code, sec. 5790). (State ex rel. Amsterdamsch Kantoor v. Superior Court, 15 Wash. 668, 47 Pac. 31.)

A corporation is not enjoined from selling all its property where there is no fraud. (Smith v. Flathead River Coal Co., 66 Wash. 408, 119 Pac. 858.)

§ 429. Removing Principal Place of Business—Notice.

[§ 3708½, Rem.–Bal.] Any corporation desiring at any time to remove its principal place of business into some other county in the state shall file in the office of the county auditor a certified copy of its certificate of incorporation. If it is desired to remove its principal place of business to some other city, town, or locality within the same county, publication shall be made of such removal at least once a week for four weeks in the newspaper published nearest to the city, town or locality from which the principal place of business of such corporation is desired to be removed. The formation or corporate acts of any corporation hereafter

formed under this chapter shall not be rendered invalid by reason of the fact that its principal place of business may not have been designated in its certificate of incorporation: Provided, that within three months from the passage of this chapter, such corporation shall cause publication to be made once a week for at least four weeks in the newspaper published nearest the city, town, or locality, and where the principal place of business of such corporation has been in fact located, designating the city, town or locality and county where its principal place of business shall be located. On compliance with the provisions of the section in the several cases herein mentioned, the principal place of business of any corporation shall be deemed established or removed at or to any designated city, town, or locality and county in the state. [Laws 1873, § 24, p. 406; Cd. 1881, § 2444; 1 H. C., § 1520; Bal., § 4276.]

§ 430. Supplemental Articles—Statement to be Filed.

[§ 3681, Rem.–Bal.] That whenever any corporation heretofore or hereafter organized under the laws of this state (including such as were organized under the laws of the territory of Washington) shall execute and file in the office of the Secretary of State and in the office of the county auditor of the proper county supplemental articles of incorporation changing its corporate name, such corporation shall file in the office of such county auditor, at the time of filing such supplemental articles or within ten days thereafter, a written notice, signed by its president, vice-president or secretary, setting forth its former corporate name and its corporate name as changed and stating that supplemental articles making such change of name have been filed in the office of the Secretary of State and in the office of the county auditor of the county (naming it). It shall be the duty of the county auditor, on payment of the proper recording fee, to record such notice as deeds are recorded and to index such notice in the general index in his office under the former corporate name as grantor and under the changed corporate name as grantee. A like notice may at the option

of such corporation be filed in the office of the county auditor of any other county, and the county auditor of such other county shall record and index the same in the manner hereinbefore provided. Corporations which have heretofore filed supplemental articles changing their corporate names shall file the notice herein provided for within six months after the taking effect of this act. [Laws 1905, § 1, c. 109, p. 215.]

Though an attempt to change the name of a company is mere futility, a judgment will not be set aside where enough appears in the complaint to identify the company. (King v. Ilwaco R. & Nav. Co., 1 Wash. 127, 23 Pac. 924.)

§ 431. Provisions, etc., Extend to Water Companies.

[§ 3678, Rem.–Bal.] The provisions of this act shall extend to and apply to all associations already formed under any law of this state, or hereafter to be formed under the provisions of this act for the purpose of supplying any cities or towns in this state, or the inhabitants thereof, with pure and fresh water. [Laws 1873, § 27, p. 408; Cd. 1881, § 2447; 1 H. C., § 1521; Bal., § 4277.]

§ 432. Water Company may Acquire Lands and Water.

[§ 9504, Rem.–Bal.] Such water companies, incorporated for the purposes specified in the preceding section, shall have the right to purchase or take possession of and use and hold such lands and waters for the purposes of the company, lying without the limits of the city or town intended to be supplied with water, upon making compensation therefor. The mode of proceeding to obtain possession of such lands for the use of the company, right of way for laying pipes, aqueducts for the use of the company, when the parties cannot agree, shall, so far as the same be applicable, be, as prescribed in section 51 of this compilation: Provided, that nothing therein contained shall be so construed as to authorize the appropriation of water belonging to any person, unless the owner thereof shall refuse to supply said city or town with water, after being requested so to do by the town board or city council.

[Laws 1883, § 8, p. 45; Cd. 1881, § 2448; 1 H. C., § 1522; Bal., § 4278.]

§ 433. Water Companies must Obtain Right or Privilege from City.

[§ 9505, Rem.–Bal.] Water companies hereafter incorporating under the provisions of this chapter, must first obtain from the corporate authorities of a city or town intended to be supplied with water the right or privilege so to do; but nothing herein contained shall affect parties now acting under legislative grants or franchises. [Laws 1873, § 29, p. 408; Cd. 1881, § 2449; 1 H. C., § 1523; Bal., § 4279.]

§ 434. Mining Corporation—Subscription of Stock.

[§ 7347, Rem.–Bal.] In incorporations already formed, or which may hereafter be formed under this chapter, where the amount of the capital stock of such corporation consists of the aggregate valuation of the whole number of feet, shares, or interest in any claim in any mining claim in this state, for the working and development of which such corporation shall be or have been formed, no actual subscription to the capital stock of such corporation shall be necessary; but each owner in said mining claim shall be deemed to have subscribed such an amount to the capital stock of such corporation as under its by-laws will represent the value of so much of his interest in said mining claim, the legal title to which he may by deed, deed of trust or other instrument vest or have vested in such corporation for mining purposes; such subscription to be deemed to have been made on the execution and delivery to such corporation of such deed, deed of trust or other instrument; nor shall the validity of any assessment levied by the board of trustees of such corporation be affected by the reason of the fact that the full amount of the capital stock of such corporation, as mentioned in its certificate of incorporation, shall not have been subscribed as provided in this section: Provided, that the greater portion of said amount of capital stock shall have been so subscribed: And provided further, that this section shall not be so construed as

to prohibit the stockholders of any corporation formed, or which may be formed for mining purposes as provided in this section, from regulating the mode of making subscriptions to its capital stock and calling in the same by by-laws or express contract. [Laws 1873, § 26, p. 407; Cd. 1881, § 2446; 1 H. C., § 1588; Bal., § 4280.]

§ 435. Corporations Prior to 1872 may Hold Property.

[§ 3685, Rem.–Bal.] All private corporations incorporated by the legislative assembly of the territory of Washington, prior to the tenth day of June, eighteen hundred and seventy-two, other than for religious purposes, be and they are hereby authorized to hold, acquire, own and possess real and personal property to the extent and to such amount as to said corporation may seem meet, anything in the acts incorporating said private corporations to the contrary notwithstanding. [Laws 1891, § 1, p. 73; 1 H. C., § 1501; Bal., § 4254.]

§ 436. Corporations Prior to 1862 may Make and Secure Debts.

[§ 3699, Rem.–Bal.] That all private corporations incorporated by the legislative assembly of the territory of Washington prior to the first day of January, 1862, other than corporations created for religious purposes, be and they hereby are authorized and empowered to issue notes, bonds, mortgages or other evidence of indebtedness and to secure the payment of the same by mortgage, trust deed or otherwise encumbering any real or personal property owned by said corporations. Said corporations shall have power to buy, sell or otherwise deal in notes, bonds and stocks of other corporations, and shall have power through their duly authorized officers to execute any and all instruments necessary to carry out the powers conferred upon said corporations by the provisions of this act. [Laws 1893, § 1, p. 279; Bal., § 4267.]

§ 437. Corporate Names not to be Duplicated.

[§ 3680, Rem.–Bal.] Private corporations may be formed in the manner prescribed by the laws of this state governing

corporations for any purpose for which individuals may lawfully associate. No corporation shall take the name of a corporation theretofore [heretofore] organized under the laws of this state, nor of any foreign corporation having complied with the laws of this state, nor one so nearly resembling the name of such other corporation as to be misleading. The Secretary of State shall refuse to file said articles of incorporation of any association or corporation violating the provisions of this act. [Laws 1903, § 1, p. 124.]

Mandamus will not issue to compel a secretary to strike from the records the name of the company delinquent in license fees for use of another company. (State ex rel. Harper v. Howell, 56 Wash. 694, 106 Pac. 470.)

A foreign company, by complying with the laws of the state, cannot use its corporate name in unfair competition with a local partnership. (Eastern Outfitting Co. v. Manheim, 59 Wash. 428, 110 Pac. 23.)

§ 438. Protection of Stockholders from Fraudulent Report. [§ 3703, Rem.–Bal.] Any superintendent, director, secretary, manager, agent or other officer of any corporation formed or existing under the laws of this state, or transacting business in this state, or any person pretending or holding himself out as such superintendent, director, secretary, manager, agent or other officer, who shall willfully subscribe, sign, indorse, verify or otherwise assent to the publication, either generally or privately, to the stockholders or to other persons dealing with such corporation, or its stock, any willfully untrue or willfully and fraudulently exaggerated report, prospectus, account, statement of operations, values, business profits, expenditures or prospects, or other paper or document intended to produce or give, or having a tendency to produce or give, to the shares of stock in such corporation a greater value than they really possess, or with the intention of defrauding any particular person or persons, or the public or persons generally, shall be deemed guilty of an offense against the laws of the state of Washington, and, upon conviction thereof, shall be punished by imprisonment in the penitentiary, not less than one nor more than five

years, or in the county jail not more than one year, or by a fine not exceeding two thousand dollars or by both. [Laws 1903, § 1, p. 141.]

§ 439. Fraud in Stock Subscription.

[§ 2638, Rem.–Bal.] Every person who shall sign the name of a fictitious person to any subscription for or any agreement to take stock in any corporation existing or proposed, and every person who shall sign to any such subscription or agreement the name of any person, knowing that such person does not intend in good faith to comply with the terms thereof, or upon any understanding or agreement that the terms of such subscription or agreement are not to be complied with or enforced, shall be guilty of a gross misdemeanor. [Laws 1909, § 386, p. 1009.]

§ 440. Fraudulent Issue of Stock, Scrip, etc.

[§ 2639, Rem.–Bal.] Every officer, agent or other person in the service of a joint stock company or corporation, domestic or foreign, who, willfully and knowingly with intent to defraud, shall—

1. Sell, pledge or issue or cause to be sold, pledged or issued, or sign or execute or cause to be signed or executed, with intent to sell, pledge or issue, or cause to be sold, pledged or issued, any certificate or instrument purporting to be a certificate or evidence of ownership of any share or shares of such company or corporation, or any conveyance or encumbrance of real or personal property, contract, bond, or evidence of debt, or writing purporting to be a conveyance or encumbrance of real or personal property, contract, bond or evidence of debt of such company or corporation, without being first duly authorized by such company or corporation, or contrary to the charter or laws under which such company or corporation exists, or in excess of the power of such company or corporation, or of the limit imposed by law or otherwise upon its power to create or issue stock or evidence of debt; or,

2. Reissue, sell, pledge or dispose of, or cause to be reissued, sold, pledged or disposed of, any surrendered or

canceled certificate or other evidence of the transfer of ownership of any such share or shares—

Shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [Laws 1909, § 387, p. 1010.]

§ 441. Insolvent Bank Receiving Deposit.

[§ 2640, Rem.–Bal.] Every owner, officer, stockholder, agent or employee of any person, firm, corporation or association engaged, wholly or in part, in the business of banking or receiving money or negotiable paper as securities on deposit or in trust, who shall accept or receive, with or without interest, any deposit, or who shall consent thereto or connive thereat, when he knows or has good reason to believe that such person, firm, corporation or association is unsafe or insolvent, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than ten thousand dollars. [Laws 1909, § 388, p. 1010.]

The section does not apply to private bankers. (State v. Youngbluth, 60 Wash. 383, 111 Pac. 240.)

It is immaterial whether the owner, officer, etc., is present or absent at the time the deposit is received. (State v. Welty, 65 Wash. 244, 118 Pac. 9.)

§ 442. Corporation Doing Business Without License.

[§ 2641, Rem.–Bal.] Every corporation, whether domestic or foreign, and every person representing or pretending to represent such corporation as an officer, agent or employee thereof, who shall transact, solicit or advertise for any business in this state, before such corporation shall have obtained from the officer lawfully authorized to issue the same, a certificate that such corporation is authorized to transact business in this state, shall be guilty of a gross misdemeanor. [Laws 1909, § 389, p. 1011.]

§ 443. False Report of Corporation.

[§ 2642, Rem.–Bal.] Every director, officer or agent of any corporation or joint stock association, and every person

engaged in organizing or promoting any enterprise, who shall knowingly make or publish or concur in making or publishing any written prospectus, report, exhibit or statement of its affairs or pecuniary condition, containing any material statement that is false or exaggerated, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars. [Laws 1909, § 390, p. 1011.]

§ 444. Warehouseman or Carrier Refusing to Issue Receipt.

[§ 2643, Rem.–Bal.] Every person or corporation, and every officer, agent and employee thereof, receiving any goods, wares or merchandise, for sale or on commission, for storage, carriage or forwarding, who, having an opportunity to inspect the same, shall fail or refuse to deliver to the owner thereof a receipt duly signed, bearing the date of issuance, describing the goods, wares or merchandise received and the quantity, quality and condition thereof, and specifying the terms and conditions upon which they are received, shall be guilty of a misdemeanor. [Laws 1909, § 391, p. 1011.]

§ 445. Fictitious Bill of Lading and Receipt.

[§ 2644, Rem.–Bal.] Every person or corporation engaged wholly or in part in the business of a common carrier or warehouseman, and every officer, agent or employee thereof, who shall issue any bill of lading, receipt or other voucher by which it shall appear that any goods, wares or merchandise have been received by such carrier or warehouseman, unless the same have been so received and shall be at the time actually under his control, or who shall issue any bill of lading, receipt or voucher containing any false statement concerning any material matter, shall be guilty of a gross misdemeanor. But no person shall be convicted under this section for the reason that the contents of any barrel, box, case, cask or other closed vessel or package mentioned in the bill of lading, receipt or voucher did not correspond with the description thereof in such instrument, if such description corresponds substantially with the mark on the outside

of such barrel, box, case, cask, vessel or package, unless it appears that the defendant knew that such marks were untrue. [Laws 1909, § 392, p. 1012.]

§ 446. Warehouseman Fraudulently Mixing Goods.

[§ 2645, Rem.–Bal.] Every person mentioned in section 392 of this act [2644, Rem.–Bal.], who shall fraudulently mix or tamper with any goods, wares or merchandise under his control, shall be guilty of a gross misdemeanor. [Laws 1909, § 393, p. 1012.]

§ 447. Duplicate Receipt.

[§ 2646, Rem.–Bal.] Every person mentioned in section 392 of this act [2644, Rem.–Bal.], who shall issue any second or duplicate receipt or voucher of the kind specified in said section, while a former receipt or voucher for the goods, wares or merchandise specified in such second receipt is outstanding and uncanceled, without writing across the face of the same the word "Duplicate," in a plain and legible manner, shall be guilty of a misdemeanor. [Laws 1909, § 394, p. 1012.]

§ 448. Bill of Lading or Receipt must be Canceled on Redelivery of Property.

[§ 2647, Rem.–Bal.] Each person mentioned in section 392 of this act [2644 Rem.–Bal.] who shall deliver to another any goods, wares or merchandise for which a bill of lading, receipt or voucher has been issued, unless such bill of lading, receipt or voucher is surrendered and canceled or a lawful and sufficient bond or undertaking is given therefor at the time of such delivery, or unless, in case of a partial delivery, a memorandum thereof is indorsed upon such bill of lading, receipt or voucher, shall be guilty of a misdemeanor. [Laws 1909, § 395, p. 1013.]

§ 449. Regulating Sale of Passage Tickets.

[§ 2648, Rem.–Bal.] It shall be the duty of every person or corporation engaged wholly or in part in the business of carrying passengers for hire, to provide every agent authorized to sell its passage tickets in this state, with a certificate

of his authority, attested by its seal and the signature of its manager, secretary or general passenger agent, which shall contain a designation of the place of business at which such authority shall be exercised.

Every person and every corporation or association, and every officer, agent or employee thereof who shall sell, exchange or transfer, or have in his possession with intent to sell, exchange or transfer, or maintain, conduct or operate any office or place of business for the sale, exchange or transfer of any passage ticket or pass or part thereof, or any other evidence of a right to travel upon any railroad or boat, whether the same be owned or operated within or without the limits of this state, in any place except his place of business, or within such place of business without having rightfully in his possession and posted in a conspicuous place therein the certificate of authority hereinabove provided for, shall be guilty of a misdemeanor. [Laws 1909, § 396, p. 1013.]

§ 450. Redemption of Unused Passage Ticket.

[§ 2649, Rem.–Bal.] Every person or corporation engaged wholly or in part in the business of carrying passengers for hire in this state, and every authorized ticket agent thereof, to whom there shall be presented by the holder thereof, within one year after its expiration, any passage ticket or part thereof, or other evidence of right to travel, wholly or in part upon the railroad or boat of such person or corporation, which shall be wholly or partially unused, who shall fail to redeem the same within three days after presentation, upon the following terms, to wit:

1. When wholly unused, for the price paid therefor; and

2. When partially unused, for the price paid therefor, less the regular toll or charge for the passage had;

Shall be punished by a fine of not more than five hundred dollars, and in addition thereto shall forfeit to the holder of such ticket or part thereof or other evidence of a right to travel, three times the redeemable value thereof. [Laws 1909, § 397, p. 1013.]

§ 451. Acknowledgment—Form of by Corporation.

[§ 8761½, Rem.-Bal.] Certificates of acknowledgment of an instrument acknowledged by a corporation substantially in the following form shall be sufficient:

State of .....
County of .....,—ss.

On this .... day of ....., A. D. 19..., before me personally appeared ..... to me known to be the [president, vice-president, secretary, treasurer, or other authorized officer or agent, as the case may be] of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Signature and title of officer.]

[Laws 1903, § 1, p. 245.]

§ 451a. Notaries Public.

It shall be lawful for any notary public who is a stockholder, director, officer or employee of a bank or other corporation to take the acknowledgment of any party to any written instrument executed to or by such corporation, or to protest for nonacceptance or nonpayment bills of exchange, drafts, checks, notes and other negotiable instruments which may be owned or held for collection by such corporation: Provided, it shall be unlawful for any notary public to take the acknowledgment of an instrument by or to a bank or other corporation of which he is a stockholder, director, officer or employee, where such notary is a party to such instrument individually or to protest any negotiable instrument owned or held for collection by such corporation, where such notary is individually a party to such instrument. [Laws 1913, c. 32.]

FOREIGN CORPORATIONS.

§ 452. Power of, to Do Business in This State.

[§ 3720, Rem.–Bal.] Any corporation incorporated under the laws of any state or territory in the United States, or of any foreign country, state or colony, for any of the purposes which domestic corporations are authorized to be formed under the laws of this state, shall have full power and is hereby authorized to sue and to be sued in any court having competent jurisdiction, to acquire, purchase, hold, mortgage, sell, convey, or otherwise dispose of, in the corporate name, all real estate or personal property necessary or convenient to carry into effect the objects and purposes of its corporation, and also any interest in real estate, by mortgage or otherwise do [due] to or loans made by such foreign corporations within the boundaries of this state, either prior to or after the passage of this act, and generally do and perform every act and transact every kind of business within this state in the same manner and to the same extent as corporations incorporated and organized under the laws of this state are authorized to do under the laws of this state, by a compliance with all the conditions prescribed by the next two succeeding sections of this chapter: Provided, however, that this act shall not be [so] construed as to allow such foreign corporation to transact business within the state on more favorable conditions than are prescribed by law for a similar corporation organized under the laws of this state: And provided further, that no corporation, the majority of the capital stock of which is owned by aliens, other than those who in good faith have declared their intention to become citizens of the United States, shall acquire the ownership of any lands in this state other than lands containing valuable deposits of minerals, metals, iron, coal or fireclay, and the necessary land for mills and machinery to be used in the development thereof, and the manufacture of the products therefrom, except where acquired under mortgage, or in good faith in the ordinary course of justice in the col-

lection of debts: Provided further, that no foreign corporation which is hereafter organized which has among its other powers the business of dealing in real estate, and buying and selling the same, and for the purpose of carrying on a real estate brokerage business shall be permitted to transact such business of buying and selling and dealing in real estate, and carrying on a brokerage business therein, in this state; but this prohibition shall not extend to any other business for the transaction of which such corporation may be organized. [Laws 1890, § 1, p. 288; Cd. 1881, § 2479; 1 H. C., § 1524; Bal., § 4291.]

The fact that a fishing company had its active place of business outside the state did not make it a nonresident. (Hastings v. Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776.)

A foreign corporation organized prior to the act of March 28, 1890, prohibiting foreign corporations from dealing as brokers of real estate is not within that statute. (Realty Co. v. Appolonio, 5 Wash. 437, 32 Pac. 219.)

In the absence of proof, a foreign corporation is presumed to have power to purchase its own stock. (Yeaton v. Eagle Oil & Ref. Co., 4 Wash. 183, 29 Pac. 1051.)

A contract cannot be repudiated on the ground that the foreign company has not complied with the statute for authority to do business. (Whitman Agr. Co. v. Strand, 8 Wash. 647, 36 Pac. 682.)

Though a foreign corporation has failed to comply with the statute for authority to do business, its contracts are binding on it. (Edison Gen. Electric Co. v. Canadian Pac. Nav. Co., 8 Wash. 370, 36 Pac. 260; Horrell v. California etc. Assn., 40 Wash. 531, 82 Pac. 889.)

A deed delivered to a corporation after compliance with the statute but executed prior thereto is not void. (Sayward v. Gardner, 5 Wash. 247, 31 Pac. 761, 33 Pac. 389.)

Compliance with the statute by a foreign company after filing of lien notice, but before suit to foreclose the same, is sufficient in the suit. (Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073.)

A party contracting with a foreign corporation is estopped to set up failure to comply with the statute. (Rathbone, Sard & Co. v. Frost, 9 Wash. 162, 37 Pac. 298.)

A fishing license is not within the constitutional provision prohibiting aliens from holding land. (Hastings v. Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776.)

A foreign corporation may sue in this state without the appointment of an agent. (Dearborn Foundry Co. v. Augustine, 5 Wash. 67, 31 Pac. 327; La France Fire Engine Co. v. Mt. Vernon, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80; Marble Savings Bank v. Williams, 23 Wash. 766, 63 Pac. 511.)

It was held that the court had jurisdiction of a foreign corporation defendant which was doing business in the state and whose officers were residents of the state. (Lively v. Husebye, 60 Wash. 47, 110 Pac. 673.)

Ballinger's Code, section 4854, requiring actions against corporations to be brought in the county where the company has an office or person upon whom service may be made resides does not apply to foreign corporations having no office or place of business in the state. (Butler v. Supreme Court of Foresters, 48 Wash. 147, 93 Pac. 66; Campbell v. Order of Washington, 53 Wash. 398, 102 Pac. 410.)

A general appearance to dismiss an action against a foreign company where the court has no jurisdiction of the subject matter does not confer jurisdiction. (Hammel v. Fidelity Mutual Aid Assn., 42 Wash. 448, 85 Pac. 35.)

A foreign corporation may be indicted for creating a public nuisance. (State v. Paggett, 8 Wash. 579, 36 Pac. 487.)

Where a foreign corporation is not doing business in the state, service on an officer temporarily in the state does not give jurisdiction. (Carstens & Earles v. Leidigh & Havens Lumber Co., 18 Wash. 450, 51 Pac. 1051.)

A foreign corporation not doing business in the state cannot be required to answer in an action in personam. (Rich v. Chicago etc. R. Co., 34 Wash. 14, 74 Pac. 1008.)

Where a company has an agent located within the state who does business for the company, it is doing business in the state. (Lee v. Fidelity Storage etc. Co., 51 Wash. 208, 98 Pac. 658; Womach v. Case etc. Co., 62 Wash. 661, 114 Pac. 509.)

Routing of freight over a foreign railway by soliciting agent is not doing business within the state. (Arrow Lumber etc. Co. v. Union Pac. R. Co., 53 Wash. 629, 102 Pac. 650.)

A foreign company with trust company powers must comply with the trust company laws of this state. (State v. Nichols, 47 Wash. 117, 91 Pac. 632.)

A foreign company authorized to do brokerage business in real estate may file its articles and do such other business as its charter and the law permits. Section 4291 of Ballinger's Code does not prevent. (State v. Nichols, 48 Wash. 605, 94 Pac. 196.)

A foreign corporation by complying with the laws of this state can not use its corporate name in unfair competition with a local partnership. (Eastern Outfitting Co. v. Manheim, 59 Wash. 428, 110 Pac. 23.)

§ 453. Certified Copy of Charter, etc., to be Filed and Recorded.

[§ 3721, Rem.–Bal.] Such corporation shall cause to be filed and recorded in the office of the Secretary of State a copy of its charter, articles of incorporation, memorandum of association, or certificate of incorporation, certified to by the officer who is the custodian of the same according to the laws of the state or territory, country or colony where such corporation is incorporated, or who is authorized to issue certificates of incorporation according to laws of such state, territory or foreign country or colony. The instruments herein required to be filed and recorded shall be attested by such certifying officer under his hand and seal of office, which attestation shall be prima facie proof of the facts herein stated, and the genuineness of the certificate. If such officer has no official seal, his certificate shall state that fact over his signature, and thereupon the Secretary of State or of the territory, in case of corporations within the United States, and the consul-general, consul, vice-consul, deputy consul, consular agent, or commercial agent of the United States, at or nearest to the place where such certificate is made, in the case of corporations not within the United States, shall certify under his hand and seal of office to the genuineness of the signature of the officer making the certificate, and to the fact that at the time of making such certificate the person making the same held the office described in the certificate. [Laws 1890, § 2, p. 289; Cd. 1881, § 2480; 1 H. C., § 1525; Bal., § 4292.]

Copy of articles of incorporation and certified copy of appointment of agent prima facie evidence of right of foreign corporation to do business. (Knapp, Burrell Co. v. Strand, 4 Wash. 686, 30 Pac. 1063.)

Special act incorporating foreign company not presumed unconstitutional. (Fidelity Insurance Co. v. Nelson, 30 Wash. 340, 70 Pac. 961.)

Purpose of 1 Hill's Code, sections 1524–1531 (1 Bal. Code, secs. 4291–4298), requiring foreign corporations to file certified copies of their articles and appoint an agent to receive service, is to prevent imposition and provide means of obtaining service. (Dearborn Foundry Co. v. Augustine, 5 Wash. 67, 31 Pac. 327.)

No comity involved in foreign corporation filing articles under laws of this state. (State ex rel. Baker etc. Co. v. Nichols, 51 Wash. 619, 99 Pac. 876.)

§ 454. Appointment of Agent to be Filed and Recorded.

[§ 3722, Rem.–Bal.] Such corporations shall also constitute and appoint an agent, who shall reside at the place in the state where the principal business of the corporation is to be carried on, to be designated as hereinafter required. Such appointment shall be in writing, signed by the president or chief officer of such corporation, and shall be attested by its corporate seal, and shall contain the name of the agent, his place of residence and the place where the principal business of such corporation is to be carried on, and shall authorize such agent to accept service of process in any action or suit pertaining to the property, business or transactions of such corporation within this state in which such corporation may be a party. The signature of such president or chief officer, attested by the corporate seal to such written appointment, shall be sufficient proof of the appointment of such agent. Such appointment, when duly executed, shall be filed for record in the office of the Secretary of State by such corporation, and shall be there recorded; and such corporation shall have and keep continually some resident agent, empowered as aforesaid during all the time such corporation shall conduct or carry on any business within this state, and service of any process, pleading, notice or other paper shall be taken and held as due service on such corporation. Such corporation may change its agent or its principal place of business, from time to time, by filing and recording with the Secretary of State a new appointment, stating the change of such agent or the change in the principal place of business; and in the event such foreign corporation shall withdraw from this state and cease to transact business therein it shall continue to keep and maintain such agent within this state upon whom service of process, pleadings and papers may be made, until the statute of limitations shall have run against anyone bringing an action against said corporation, which accrued prior to its with-

drawal from this state. In case said corporation shall revoke the authority of its designated agent after its withdrawal from this state and prior to the time when the statutes of limitations would have run against causes of action accruing against it, then in that event service of process, pleadings and papers in such actions may be made upon the Secretary of State of the state of Washington, and the same shall be held as due and sufficient service upon such corporation. [Laws 1909, § 3, p. 72; 1 H. C., § 1526; Bal., § 4293.]

Sheriff's return must show service on agent within the statute. (Cunningham v. Spokane H. Co., 18 Wash. 524, 52 Pac. 235.)

Under Ballinger's Code, section 4893, service on a statutory agent of a foreign corporation is insufficient. (Bennett v. Supreme Tent Maccabees, 40 Wash. 431, 82 Pac. 744.)

Laws of 1895, page 157, not exclusive method of service on agent, and service as provided in Ballinger's Code, section 4875, is sufficient. (Tatum v. Niagara Fire Ins. Co., 43 Wash. 373, 86 Pac. 660.)

Appearance waives defective service. (Dittenhofer v. Coeur D'Alene etc. Co., 4 Wash. 519, 30 Pac. 660.)

Unnecessary that appointment of attorney verifying mechanic's lien notice for foreign company be filed in office of Secretary of State. (Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073.)

Under Ballinger's Code, section 4854, superior court in county where foreign company has no agent gets no jurisdiction by service on agent in another county. (Hammel v. Fidelity Mutual Aid Assn., 42 Wash. 448, 85 Pac. 35.)

§ 455. Penalty.

[§ 3723, Rem.–Bal.] Any foreign corporation doing business in this state which shall fail to comply with the provisions of sections 3721 and 3722, Rem.–Bal. Code of Washington, shall be subject to a penalty of two hundred and fifty dollars to be recovered in a civil action to be instituted by the attorney general in the name of the state of Washington, upon his being furnished with a sworn statement of facts sufficient to justify such action. [Laws 1899, § 1, p. 100.]

Purchase of a single promissory note or mortgage is not doing business in the state within the statute applicable to foreign corporations. (Keene Guaranty Savings Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680.)

Maintaining advertising agent is not doing business in the state. (Rich v. Chicago B. & Q. R. Co., 34 Wash. 14, 74 Pac. 1008.)

Statutory penalty for failure to comply with the statute is exclusive. (La France Fire Engine Co. v. Mt. Vernon, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80; Rathbone, Sard & Co. v. Frost, 9 Wash. 162, 37 Pac. 298.)

Failure of foreign company to file copy of charter and appoint agent does not render its contract void. (Dearborn Foundry Co. v. Augustine, 5 Wash. 67, 31 Pac. 327.)

Contract cannot be repudiated on ground that the foreign company has not complied with the statute for authority to do business. (Whitman Agr. Co. v. Strand, 8 Wash. 647, 36 Pac. 682.)

Only the state has the right to question authority of foreign corporation to hold land in this state. (Oregon Mtg. Co. v. Carstens, 16 Wash. 165, 47 Pac. 421; Goon Gan v. Richardson, 16 Wash. 373, 47 Pac. 762; State ex rel. Winston v. Hudson Land Co., 19 Wash. 85, 52 Pac. 574.)

§ 456. Penalty Goes to State Treasurer.

[§ 3724, Rem.–Bal.] All penalties so recovered shall be paid into the general fund of the state treasury. [Laws 1899, § 2, p. 100.]

§ 457. Act does not Apply to Companies—When.

[§ 3725, Rem.–Bal.] No corporation which has heretofore complied with the laws of the state or territory of Washington hitherto existing, regarding foreign corporations, and has kept a duly appointed agent within the boundaries of the state as heretofore required, shall be required to file for record, or cause to be recorded, the certified copies required by this act, or to execute or file for record, or cause to be recorded, a new appointment of agent as herein required. [Laws 1890, § 4, p. 290; 1 H. C., § 1527; Bal., § 4294.]

§ 458. County Assessor Shall Report to County Auditor.

[§ 3726, Rem.–Bal.] It shall be the duty of each and every county assessor in this state to ascertain each and every year, at the time of the tax assessment of his county, the name of every foreign corporation doing business by agent or otherwise within his county, the nature of such business, and the name of the agent of each of such corporations, if any there be, together with such agent's place of address, and shall, within ten days from and after the compilation of such as-

sessment, make out and deliver to the county auditor of his county a full and complete list of the names of such corporations doing business in his county, together with the nature of the business so carried on by each of such corporations and the name of the resident agent of each of such corporations, if any there be, and the place of residence of each of such agents. [Cd. 1881, § 2482; 1 H. C., § 1528; Bal., § 4295.]

§ 459. County Auditor to Report to Secretary of State.

[§ 3727, Rem.–Bal.] It shall be the duty of each and every county auditor in this state to make out and transmit to the Secretary of State, within thirty days after the receipt by him from such county assessor of the lists provided in section fifteen hundred and twenty-eight of this volume of general statutes [3726, Rem.–Bal.], a full, true and concise statement of the names of such corporations, their place of business, the nature of business conducted by such corporations, and the name of each and every agent of each of such corporations, if any there be, and the places of residence of such agents. [Cd. 1881, sec. 2483; 1 H. C., § 1529; Bal., § 4296.]

§ 459a. Recording Fees.

[§ 3728, Rem.–Bal.] The fees for recording, under the provisions of this chapter, shall be the same as are allowed by law to the Secretary of State for certified copies of papers on file in his office. [Cd. 1881, § 2484; 1 H. C., § 1530; Bal., § 4297.]

§ 460. Agent's Liability.

[§ 3729, Rem.–Bal.] Any agent of any foreign corporation conducting or carrying on business within the limits of this state, for and in the name of such corporation, contrary to any of the provisions of this chapter, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail for a term not exceeding three months, or by both such fine and imprisonment. [Cd. 1881, § 2485; 1 H. C., § 1531; Bal., § 4298.]

§ 461. County Officers' Liability.

[§ 3730, Rem.–Bal.] Any county assessor failing to make out and deliver to the county auditor of his county a list within the time and in the manner provided in section 2485, [Rem.–Bal., § 3726] and any county auditor failing to make out and transmit to the Secretary of State a statement, within the time and in the manner provided in section 2482 [Rem.–Bal., § 3727] shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding three hundred dollars. [Cd. 1881, § 2486; 1 H. C., § 1532; Bal., § 4299.]

RIGHT OF EMINENT DOMAIN BY CORPORATION.

§ 462. Right to Appropriate Water and Build Dams, etc.

[§ 9509, Rem.–Bal.] Any person or persons, or company now incorporated, or that may hereafter become incorporated under the laws of this state, for the purpose of mining or manufacturing, shall have the right to purchase or appropriate and take possession of and divert from its natural channel, and use and hold the waters of any river, creek or stream in this state that may be required for the mining and manufacturing purposes of any such person or persons. corporation or corporations, and to construct all dams, canals, reservoirs, ditches, pipes, flumes and aqueducts suitable and necessary for the controlling, directing, and running such waters to their mines or manufacturing establishments of any such person or persons, corporation or corporations, where the same may be intended to be utilized for such purposes: Provided, that no such appropriation or diversion of the water of any such river, creek, or stream from its natural channel, nor shall any such dam, canal, reservoir, ditch, pipe, flume or aqueduct be constructed, to the detriment of any person or persons, corporation or corporations, occupying the lands or being located below the point or place of such appropriation or diversion on any such stream or its tributaries, or above or below such dam, canal, reservoir, ditch, pipe, flume, or aqueduct, or the owners of the land through which the waters run in the natural course for the deprivation of the same, or the owners of the land through or upon which such dam, canal, reservoir, ditch, pipe, flume, or aqueduct may pass through or over, or be situated upon, unless just and adequate compensation be previously ascertained and paid therefor. [Laws 1879, § 1, p. 124; 1 H. C., § 1589; Bal., § 4281.]

A company may condemn land in accordance with its special charter or subsequent general law. (Cascades R. Co. v. Johns, 1 Wash. Ter. 557.)

Water for manufacturing purposes not public use. (State ex rel. Tacoma Indust. Co. v. White River Power Co., 39 Wash. 648, 82 Pac. 150; Sievers v. Dalles P. & A. Nav. Co., 24 Wash. 302, 64 Pac. 539.)

§ 463. Appropriation—Procedure—Petition—Requisites of. [§ 921, Rem.–Bal.] Any corporation authorized by law to appropriate land, real estate, premises, or other property for right of way or any other corporate purposes, may present to the superior court of the county in which any land, real estate, premises, or other property sought to be appropriated shall be situated, or to the judge of such superior court, in any county where he has jurisdiction or is holding court, a petition in which the land, real estate, premises, or other property sought to be appropriated, shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records, the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by such corporation, to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such lands, real estate, premises, or other property, or in case a jury be waived, as in other civil cases in courts of record in the manner prescribed by law, then that the compensation to be made, as aforesaid, be ascertained and determined by the court, or judge thereof. [Laws 1890, § 1, p. 294; 2 H. C., § 648; Bal., § 5637.]

Taking of land by eminent domain not strictly action in rem. (Smith's Petition, 9 Wash. 85, 37 Pac. 311, 494.)

Taking of private property for public use one of the recognized powers of sovereignty. (Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670.)

Statutes authorizing condemnation are strictly construed. (Spokane v. Colby, 16 Wash. 610, 48 Pac. 248; Seattle v. Fidelity Trust

Co., 22 Wash. 154, 60 Pac. 133; State v. Superior Court, Chelan, 36 Wash. 381, 78 Pac. 1011.)

One company cannot condemn for another. (Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551.)

PUBLIC USE.

Boom companies are quasi public and may be given right to condemn. (North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750.)

Ballinger's Code, section 4379, gives boom company right to condemn the land selected in its "plat of survey." (Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670.)

Railroad company constructing its road will be protected from appropriation of its terminals. (State ex rel. Spokane Falls & N. R. Co. v. Superior Court, 40 Wash. 389, 82 Pac. 417.)

Question of public use is judicial question determined by character, not extent of use. (Peterson v. Smith, 6 Wash. 163, 32 Pac. 1050; Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; State ex rel. Ami Co. v. Superior Court, 42 Wash. 675, 85 Pac. 669; North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750; Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779.)

The use in eminent domain must be by the public or some quasi-public agency. (Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681.)

Water for manufacturing purposes not public use. (State ex rel. Tacoma Indust. Co. v. White River Power Co., 39 Wash. 648, 82 Pac. 150.)

Street railway public use. (State ex rel. Harlan v. Centralia Co., 42 Wash. 632, 85 Pac. 344.)

Sale of electric power to public not public use. (State ex rel. Harris v. Superior Court, 42 Wash. 660, 85 Pac. 666.)

Highway or public street is public use. (State ex rel. Schroeder v. Superior Court, 29 Wash. 1, 69 Pac. 366; State ex rel. Thomas v. Superior Court, 42 Wash. 521, 85 Pac. 256.)

Right of way for logging roads and lumbering purposes not public use. (Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681; Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 Pac. 1046.)

Right of way for railroad public use. (State ex rel. Smith v. Superior Court, 30 Wash. 219, 70 Pac. 484; State ex rel. Trimble v. Superior Court, 31 Wash. 445, 72 Pac. 89; State ex rel. Harlan v. Centralia Co., 42 Wash. 632, 85 Pac. 344.)

Boom company public carrier of logs as distinguished from private company is quasi public and may condemn land for its public use. (North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750; Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 Pac. 1046.)

Irrigation ditch is public use. (Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635; Weed v. Goodwin, 36 Wash. 31, 78 Pac. 36.)

Levees and dikes a public use. (Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332.)

Drainage of lands public use. (Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779.)

Tide lands, school lands or other public property may not be taken by condemnation. (Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551; North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750; Samish Boom Co. v. Callvert, 27 Wash. 611, 68 Pac. 367; State ex rel. Trimble v. Superior Court, 31 Wash. 445, 72 Pac. 89.)

One public or quasi-public corporation may condemn property of another not interfering with the public use by the latter company, e. g., railroad crossings and connections. (Seattle & M. R. Co. v. Bellingham Bay & E. R. Co., 29 Wash. 491, 69 Pac. 1107; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551; State ex rel. Spokane Falls & N. R. Co. v. Superior Court, 40 Wash. 389, 82 Pac. 417.)

Section 6326, Remington and Ballinger's Code, authorizing condemnation of land for irrigation ditches by private owner, constitutional. (State ex rel. Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. 429.)

A private use incidental to the public use does not deprive a company of right of condemnation. (State ex rel. Harris v. Olympia L. & P. Co., 46 Wash. 511, 90 Pac. 656; State ex rel. Burrows v. Superior Court, 48 Wash. 277, 93 Pac. 423; State ex rel. Shropshire v. Superior Court, 51 Wash 386, 99 Pac. 3; State ex rel. Dominick v. Superior Court, 52 Wash. 196, 100 Pac. 317; State ex rel. McIntosh v. Superior Court, 56 Wash. 214, 105 Pac. 637; Tacoma v. Nisqually Power Co., 57 Wash. 420, 107 Pac. 199; State ex rel. Clark v. Superior Court, 62 Wash. 612, 114 Pac. 444.)

A county road or an alley is a public use. (State ex rel. Jones v. Superior Court, 44 Wash. 476, 87 Pac. 521; State ex rel. Paget v. Superior Court, 47 Wash. 11, 91 Pac. 241.)

The public use of a right of way not affected by the agreement of railway company as health requirement not to maintain stations thereon. (State ex rel. Kent Lumber Co. v. Superior Court, 46 Wash. 516, 90 Pac. 663.)

A railway terminal company connecting business establishments with terminals by tracks and ferries is a railroad company entitled to exercise right of eminent domain. (State ex rel. Milwaukee Term. R. Co. v. Superior Court, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175.)

Toll-logging road as public carrier is public use. (State ex rel. Clark v. Superior Court, 62 Wash. 612, 114 Pac. 444.)

Use of banks of stream by boom company for artificial freshets is public use. (State ex rel. Wilson v. Superior Court, 47 Wash. 397,

92 Pac. 269; State ex rel. Pealer v. Superior Court, 58 Wash. 565, 109 Pac. 340.)

Land necessary for freight warehouse for railroad is public use. (State ex rel. True v. Superior Court, 56 Wash. 249, 105 Pac. 639.)

Right of way of private railroad may be condemned. (State ex rel. Kent Lumber Co. v. Superior Court, 46 Wash. 516, 90 Pac. 663.)

Remington & Ballinger's Code, sections 5717, 5718, authorizing condemnation by railroads, do not authorize condemnation of city street. (State ex rel. Schade Brew. Co. v. Superior Court, 62 Wash. 96, 113 Pac. 576.)

Property already devoted to public use may be condemned where necessary. (Tacoma v. Nisqually Power Co., 57 Wash. 420, 107 Pac. 199; State ex rel. Columbia Valley R. Co. v. Superior Court, 45 Wash. 316, 88 Pac. 332; North Coast R. v. Northern Pac. R. Co., 48 Wash. 529, 94 Pac. 112; State ex rel. Milwaukee Terminal R. Co. v. Superior Court, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175; State ex rel. Everett & Cherry Valley Tr. Co. v. Superior Court, 59 Wash. 598, 110 Pac. 428; State ex rel. Portland & Seattle R. Co. v. Superior Court, 45 Wash. 270, 88 Pac. 201; State ex rel. Kent Lumber Co. v. Superior Court, 46 Wash. 516, 90 Pac. 663; State ex rel. North Coast R. v. Northern Pacific R. Co., 49 Wash. 78, 94 Pac. 907.)

Riparian rights on navigable and non-navigable waters may be condemned under Ballinger's Code, section 4143, except so far as needed by owner for irrigation of his own lands. (State ex rel. Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. 650; State ex rel. Burrows v. Superior Court, 48 Wash. 277, 93 Pac. 423; State ex rel. Wilson v. Gray's Harbor etc. R. Co., 60 Wash. 32, 110 Pac. 676; State ex rel. Liberty Lake Irr. Co. v. Superior Court, 47 Wash. 310, 91 Pac. 968; Spokane Valley Land & Water Co. v. Jones & Co., 53 Wash. 37, 101 Pac. 515.)

TAKING OF PRIVATE PROPERTY.

The entire fees or such interest as is necessary may be condemned. (Oregon R. & Nav. Co. v. Owsley, 3 Wash. Ter. 38, 13 Pac. 186; Nicomen Boom Co. v. North Shore Boom Co., 40 Wash. 315, 82 Pac. 412.)

Word "damaged" in constitution, article 1, section 16, does not mean same as "taken." (Brown v. Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214.)

What is taking is judicial question. (Bowes v. Aberdeen, 58 Wash. 535, 109 Pac. 369.)

Building of wharves on shores of navigable waters neither taking nor damaging. (Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539.)

Construction of slopes on abutting property on lowering grade of street is damaging, not taking. (Compton v. Seattle, 38 Wash. 514, 80 Pac. 757.)

A statute authorizing the taking of private property without assessment of damages or payment of compensation is unconstitutional. (Askham v. King County, 9 Wash. 1, 36 Pac. 1097; Skagit County v. Stiles, 10 Wash. 388, 39 Pac. 116; Snohomish County v. Hayward, 11 Wash. 429, 39 Pac. 652.)

The property owner has the constitutional right to have compensation paid before his property is taken. (Peterson v. Smith, 6 Wash. 163, 32 Pac. 1060; In re Smith's Petition, 9 Wash. 85, 37 Pac. 311, 494; Puyallup v. Lacey, 43 Wash. 110, 86 Pac. 215; Adams County v. Dobschlag, 19 Wash. 356, 53 Pac. 339; Olson v. Seattle, 30 Wash. 687, 71 Pac. 201.)

A property owner may waive his right to compensation. (Oregon R. & Nav. Co. v. Owsley, 3 Wash. Ter. 38, 13 Pac. 186; Oregon R. & Nav. Co. v. Day, 3 Wash. Ter. 252, 14 Pac. 588; Lewis v. Seattle, 5 Wash. 741, 32 Pac. 794; Kaufman v. Tacoma, O. & G. H. R. Co., 11 Wash. 632, 40 Pac. 137.)

A lessee of land has property right for which he is entitled to damages in condemnation by railroad. (Seattle & M. R. Co. v. Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503.)

So has a vendee in contract for state tide lands. (State ex rel. Trimble v. Superior Court, 31 Wash. 445, 72 Pac. 89.)

So a claimant under timber culture entry. (Yakima County v. Tullar, 3 Wash. Ter. 393, 17 Pac. 885.)

So a claimant under pre-emption entry of public lands. (Enoch v. Spokane Falls etc. R. Co., 6 Wash. 393, 33 Pac. 966.)

So an abutting owner's easement of light, air and access to street. (State ex rel. Smith v. Superior Court, 30 Wash. 219, 70 Pac. 484.)

COMPENSATION.

Injunction will issue to restrain the taking of private property for public use without first making compensation. (Brown v. Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214; Olson v. Seattle, 30 Wash. 687, 71 Pac. 201; Swope v. Seattle, 36 Wash. 113, 78 Pac. 607; Seattle Transfer Co. v. Seattle, 27 Wash. 520, 68 Pac. 90.)

Elements of compensation in condemnation: Destruction of valuable springs. (Yakima County v. Tullar, 3 Wash. Ter. 393, 17 Pac. 885.) Discharge of water on owner's premises. (Wendel v. Spokane Co., 27 Wash. 121, 67 Pac. 576.) Obstruction of stream of water. (Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.) Obstruction of access to property. (Patton v. Olympia Door etc. Co., 15 Wash. 210, 46 Pac. 237; Hatch v. Tacoma etc. R. Co., 6 Wash. 1, 32 Pac. 1063; Schwede v. Hemrich Bros. Brew. Co., 29 Wash. 21, 69 Pac. 362.) Obstruction of light and air. (Brown v. Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214; State ex rel. Smith v. Superior Court, 26 Wash. 278, 66 Pac. 385; Seattle Transfer Co. v. Seattle, 27 Wash. 520, 68 Pac. 90.) Fencing and crossings made necessary by the condemnation.

(Seattle & M. R. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. 738; Seattle & Mont. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720.) Soot, cinders, smoke, odors, vibration. (Smith v. St. Paul etc. R. Co., 39 Wash. 355, 81 Pac. 840.) New use as telephone line in addition to pipe-line. (Spokane v. Colby, 16 Wash. 610, 48 Pac. 248.) Destruction of growing crops. (Seattle & M. R. Co. v. Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503.) Value for special use. (Seattle & M. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.)

Owner by stipulating compensation waives objection and rights. (Pearl Oyster Co. v. Seattle & Montana R. Co., 53 Wash. 101, 101 Pac. 503.)

Owner of tide lands entitled to compensation for the lands taken, the damage to lands not taken and the value of statutory lease rights, and immaterial that owner became such after proceedings begun. (State ex rel. Hulme v. Gray's Harbor etc. R. Co., 54 Wash. 530, 103 Pac. 809.)

Current for water power being destroyed is element of damages. (Inland Empire R. Co. v. McKinley, 48 Wash. 675, 94 Pac. 644.)

Boom-site on tide lands not appurtenant to uplands and its value not assessable as damages. (Gray's Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.)

Otherwise where defendants own the shore. (Columbia etc. Co. v. Hutchinson, 56 Wash. 323, 105 Pac. 636.)

Right of ingress and egress to lots abutting on a street is property to be compensated. (Lund v. Idaho etc. R., 50 Wash. 574, 97 Pac. 665.)

Remote damage not compensated. (Chicago M. & St. P. R. Co. v. Alexander, 47 Wash. 131, 91 Pac. 626; Gray's Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.)

Abutting owner's interest in maintenance of street must be compensated. (Brazell v. Seattle, 55 Wash. 180, 104 Pac. 155; Smith v. Centralia, 55 Wash. 573, 104 Pac. 797.)

Neighboring property not abutting street or right of way not entitled to compensation. (In re Fifth Avenue, 62 Wash. 218, 113 Pac. 762; Clute v. North Yakima etc. R. Co., 62 Wash. 531, 114 Pac. 513.)

Measure of compensation is the value of lands taken irrespective of benefits and damage to lands not taken (Olympia Light & Power Co. v. Harris, 58 Wash. 410, 108 Pac. 940; Gray's Harbor etc. Co. v. Kauppinen, 53 Wash. 238, 101 Pac. 835); but Remington and Ballinger's Code, section 7725, does not authorize compensation for damage to contiguous lot appropriated to distinct use. (Seattle v. Atwood, 59 Wash. 112, 109 Pac. 326.)

The constitutional requirement, article 1, section 16, that property taken or damaged be paid for irrespective of benefits, does not apply

to county road. (Kitsap County v. Melker, 50 Wash. 29, 96 Pac. 695; Tacoma v. Wetherby, 57 Wash. 295, 106 Pac. 903.)

Award of damages in condemnation draws interest from verdict to entry of judgment. (North Coast R. Co. v. Aumiller, 61 Wash. 271, 112 Pac. 384.)

As between two public service companies seeking condemnation of the same lands, the one prior in time is prior in right. (State ex rel. Cascade etc. Co. v. Superior Court, 53 Wash. 321, 101 Pac. 1094; State ex rel. Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. 659.)

Where owners had been compensated by legislative act, they were held not entitled to compensation in condemnation proceedings. (Lewis County v. McGeorge, 47 Wash. 414, 92 Pac. 268.)

Measure of damages in condemnation is fair market value of land taken at time of appropriation, though enhanced by the proposed improvement, together with damage to land not taken, irrespective of benefits from the improvement. (Enoch v. Spokane Falls etc. R. Co., 6 Wash. 393, 33 Pac. 966; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.)

PROCEDURE.

A person in possession must be made a party defendant and notice must be given to all interested parties. (Owen v. St. Paul etc. R. Co., 12 Wash. 313, 41 Pac. 44; Chehalis County v. Ellingson, 21 Wash. 638, 59 Pac. 485; Weed v. Goodwin, 36 Wash. 31, 78 Pac. 36; State ex rel. Trimble v. Superior Court, 31 Wash. 445, 72 Pac. 89.)

Service may be made by publication where personal service impossible. (Moynahan v. Superior Court, 42 Wash. 172, 84 Pac. 655; State ex rel. Thomas v. Superior Court, 42 Wash. 521, 85 Pac. 256.)

Petition sufficient if it plainly notifies defendants of the issues. (Lewis County v. Schobey, 31 Wash. 357, 71 Pac. 1029; Chelan County v. Navarre, 38 Wash. 684, 80 Pac. 845.)

No plea or answer is necessary. (Seattle & M. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720; State ex rel. Ami Co. v. Superior Court, 42 Wash. 675, 85 Pac. 669.)

The petitioner company has the burden of proof and the right to open and close. (Bellingham Bay etc. R. Co. v. Strand, 4 Wash. 311, 30 Pac. 144; Seattle & M. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720; Seattle & M. R. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. 738.)

It is within the discretion of the court to permit the jury to view the premises. (Bellingham Bay etc. R. Co. v. Strand, 4 Wash. 311, 30 Pac. 144; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.)

Question of future damages may be submitted to the jury. (Swope v. Seattle, 36 Wash. 113, 78 Pac. 607.)

Assessment of damages by commissioners unconstitutional. Question of damages must be submitted to jury. (Peterson v. Smith, 6 Wash. 163, 32 Pac. 1050; In re Smith's Petition, 9 Wash. 85, 37 Pac.

311, 494; Seanor v. County Commrs., 13 Wash. 48, 42 Pac. 552; Snohomish County v. Hayward, 11 Wash. 429, 39 Pac. 652.)

Petitioner may abandon proceedings for condemnation before possession taken but not after possession taken and verdict. (Port Angeles Pac. R. Co. v. Cooke, 38 Wash. 184, 80 Pac. 305; Bellingham Bay B. C. R. Co. v. Strand, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238.)

APPEALS.

Appeals must be taken in compliance with the provision therefor in the condemnation law; not governed by the general law. (Western American Co. v. St. Ann Co., 22 Wash. 158, 60 Pac. 158; Seattle & M. R. Co. v. O'Meara, 4 Wash. 17, 29 Pac. 835; Pearson v. Island County, 3 Wash. 497, 28 Pac. 1108.)

Certiorari will lie to review questions in condemnation proceedings only where they cannot be reviewed on appeal. (Seattle & M. R. Co. v. State, 5 Wash. 807, 32 Pac. 744; Parker v. Superior Court, 25 Wash. 544, 66 Pac. 154; Seattle & M. R. Co. v. Bellingham etc. R. Co., 29 Wash. 491, 69 Pac. 1107; State ex rel. Smith v. Superior Court, 30 Wash. 219, 70 Pac. 484; State ex rel. Trimble v. Superior Court, 31 Wash. 445, 72 Pac. 89; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681; State ex rel. Morrell v. Superior Court, 33 Wash. 542, 74 Pac. 686; State ex rel. Nelson v. Superior Court, 31 Wash. 32, 71 Pac. 601; State ex rel. Ami Co. v. Superior Court, 42 Wash. 675, 85 Pac. 669; State ex rel. Alexander v. Superior Court, 42 Wash. 684, 85 Pac. 673; State ex rel. Young v. Superior Court, 43 Wash. 34, 85 Pac. 989; State ex rel. McCormick v. Superior Court, 43 Wash. 91, 86 Pac. 205.)

MISCELLANEOUS.

Costs in condemnation proceedings are taxed against the petitioner, not against nonassenting owner. (Owsley v. Oregon R. & Nav. Co., 1 Wash. 491, 20 Pac. 782; Adams County v. Dobschlag, 19 Wash. 356, 53 Pac. 339; Lewis County v. Schobey, 31 Wash. 357, 71 Pac. 1029.)

Statutes of eminent domain are strictly construed. (North Coast R. Co. v. Aumiller, 61 Wash. 271, 112 Pac. 384.)

A private company generating power to be sold at profit cannot, by offering to serve the public, acquire right of eminent domain. (State ex rel. Tolt Power etc. Co. v. Superior Court, 50 Wash. 13, 96 Pac. 519.)

An abutter on street whose interests are being condemned by railroad company has interest to question right of condemnation. (State ex rel. Sylvester v. Superior Court, 60 Wash. 279, 111 Pac. 19.)

City council proper authority to determine question of public use and necessity. (Seattle v. Byers, 54 Wash. 518, 103 Pac. 791; Tacoma v. Titlow, 53 Wash. 217, 101 Pac. 827; In re Mercer St., 55 Wash. 116, 104 Pac. 133.)

Section 4250, Ballinger's Code, that no railroad company shall condemn land until the whole of its capital stock subscribed, is rule of public policy and not waived by failure of owner to set up the defect. (State ex rel. Hulme v. Gray's Harbor etc. R. Co., 54 Wash. 530, 103 Pac. 809.)

A town may condemn land for an alley on its own initiative and petition by majority of property owners affected not jurisdictional prerequisite. (State ex rel. Jones v. Superior Court, 44 Wash. 476, 87 Pac. 521.)

A railroad company cannot condemn an abutter's interest in a city street without first obtaining a franchise from the city to use the streets. (State ex rel. Sylvester v. Superior Court, 60 Wash. 279, 111 Pac. 19; State ex rel. Schade Brew. Co. v. Superior Court, 62 Wash. 96, 113 Pac. 576.)

Attempt to agree with owner not condition precedent to condemnation. (State ex rel. Skamania Boom Co. v. Superior Court, 47 Wash. 166, 91 Pac. 637; State ex rel. Wilson v. Superior Court, 47 Wash. 397, 92 Pac. 269; State ex rel. Burrows v. Superior Court, 48 Wash. 277, 93 Pac. 423.)

Laches in building line no defense in condemnation proceedings. (State ex rel. McIntosh v. Superior Court, 56 Wash. 214, 105 Pac. 637.)

A person in possession must be made a party defendant and notice must be given all interested parties. (Owen v. St. Paul etc. R. Co., 12 Wash. 313, 41 Pac. 44; Chehalis County v. Ellingson, 21 Wash. 638, 59 Pac. 485; Weed v. Goodwin, 36 Wash. 31, 78 Pac. 36; State ex rel. Trimble v. Superior Court, 31 Wash. 445, 72 Pac. 89.)

Notice is properly served on mortgagee lien claimant and city having lien for assessments making them parties. (North Coast R. Co. v. Hess, 56 Wash. 335, 105 Pac. 853.)

§ 464. Notice—Contents of and Service.

[§ 922, Rem.–Bal.] A notice, stating briefly the objects of the petition, and containing a description of the land, real estate, premises, or property sought to be appropriated, and stating the time and place when and where the same will be presented to the court, or the judge thereof, shall be served on each and every person named therein as owner, encumbrancer, tenant, or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering a copy of such notice to each of the persons or parties so named therein, if a resident of the state; or in case of the absence of such person or party from his or her

usual place of abode, by leaving a copy of such notice at his or her usual place of abode, or in case of a foreign corporation, at its principal place of business in this state, with some person of more than sixteen years of age. In case of domestic corporations, such service shall be made upon the president, secretary, or other director or trustee of such corporation. In case of minors on their guardians, or in case no guardian shall have been appointed, then on the person who has the care and custody of such minor. In case of idiots, lunatics, or distracted persons, on their guardian; or in case no guardian shall have been appointed, then on the person in whose care or charge they are found. In case the land, real estate, premises, or other property sought to be appropriated is state school, or county land, the notice shall be served on the auditor of the county in which the land, real estate, premises or other property sought to be appropriated is situated. In all cases where the owner or person claiming an interest in such real or other property is a nonresident of this state, or where the residence of such owner or person is unknown, and an affidavit of the agent or attorney of the corporation shall be filed that such owner or person is a nonresident of this state, or that, after diligent inquiry his residence is unknown, or cannot be ascertained by such deponent, service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks; and in case no newspaper is published in said county, then such publication may be had in a newspaper published in the county nearest to the county in which lies the land sought to be appropriated. And such publication shall be deemed service upon each of nonresident person or persons whose residence is unknown. Such notice shall be signed by the president, manager, secretary, or attorney of the corporation; and in case the proceedings provided for in this act are instituted by the owner or any other person or party interested in the land, real estate, or other property sought to be appropriated, then such notice shall be signed by such owner, person or party interested, or his, her, or its attorney. Such

notice may be served by any competent person over twenty-one years of age. Due proofs of the service of such notice, by affidavit of the person serving the same, or by the printer's affidavit of publication, shall be filed with the clerk of such superior court before or at the time of the presentation of such petition. Want of service of such notice shall render the subsequent proceedings void as to the person not served; but all persons or parties having been served with notice as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings. In all other cases not otherwise provided for, service of notices, order, and other papers in the proceedings authorized by this act may be made as the superior court, or the judge thereof may direct. [Laws 1890, § 2, p. 295; 2 H. C., § 649; Bal., § 5638.]

Notice must be served personally or by publication on all parties interested. (Moynahan v. Superior Court, 42 Wash. 172; State ex rel. Trimble v. Superior Court, 31 Wash. 445; Chehalis County v. Ellingson, 21 Wash. 638; Weed v. Goodwin, 36 Wash. 31; Thomas v. Superior Court, 42 Wash. 521; Spokane etc. Ry. Co. v. Connelly, 48 Wash. 515; King County v. Melker, 50 Wash. 29; Hanson v. Hammer, 15 Wash. 315.)

§ 464a. Lands Owned by State.

[§ 923, Rem.–Bal.] In all condemnation proceedings brought for the purpose of appropriating any land owned by the state or in which it has an interest, service of process shall be made upon the commissioner of public lands. [Laws 1907, p. 507, § 1.]

§ 465. Adjournment of Proceedings.

[§ 924, Rem.–Bal.] The court or judge may, upon the application of the petitioner or of any owner or party interested, for reasonable cause, adjourn the proceedings from time to time, and may order new or further notice to be given to any party whose interest may be affected. [Laws 1890, § 3, p. 297; 2 H. C., § 650; Bal., § 5639.]

§ 466. Jury shall be Summoned.

[§ 925, Rem.–Bal.] At the time and place appointed for hearing said petition, or to which the same may have been

adjourned, if the court, or judge thereof, shall have satisfactory proof that all parties interested in the land, real estate, premises, or other property described in said petition have been duly served with said notice as above prescribed, and shall be further satisfied, by competent proof, that the contemplated use for which the land, real estate, premises, or other property sought to be appropriated is really a public use, or is for a private use for a private way of necessity, and that the public interest requires the prosecution of such enterprise, or the private use is for a private way of necessity, and that the land, real estate, premises, or other property sought to be appropriated are required and necessary for the purposes of such enterprise, the court, or judge thereof, may make an order, to be recorded in the minutes of said court, directing the sheriff to summon from the citizens of the county in which any lands, real estate, premises, or other property sought to be appropriated shall be situated as many qualified persons as may be necessary in order to form a jury of twelve persons, unless the parties to the proceedings consent to a less number (such number to be not less than three), and such consent shall be entered by the clerk in the minutes of the trial. If necessary to complete the jury, the sheriff, under direction of the court, or judge thereof, shall summon as many qualified persons as may be required to complete the jury from the bystanders, citizens of the county where the land, real estate, premises, or other property is situated. [Laws 1897, § 1, p. 63; 2 H. C., § 651; Bal., § 5640.]

Assessment of damages by commissioners, unconstitutional; question of damages must be submitted to jury. (Peterson v. Smith, 6 Wash. 163, 82 Pac. 1050; In re Smith's Petition, 9 Wash. 85, 37 Pac. 311, 494; Seanor v. County Commrs., 13 Wash. 48, 42 Pac. 552; Snohomish County v. Hayward, 11 Wash. 429, 39 Pac. 652.)

It is for the court to determine whether there is proof that the land sought to be condemned is required and necessary. (State ex rel. Postal Tel. etc. Co. v. Superior Court, 64 Wash. 189, 116 Pac. 855.)

The selection by the condemner makes prima facie case of necessity. (State ex rel. Sylvester v. Superior Court, 64 Wash. 594, 117 Pac. 487.)

Question of public use is for the court and its adjudication is conclusive. (Peterson v. Smith, 6 Wash. 163; Healy Lumber Co. v. Morris, 33 Wash. 490; Sulton W. & P. Co. v. Weyerhauser etc. Co., 31 Wash. 558.)

Property cannot be taken for private use. (Harris v. Superior Court, 42 Wash. 660.)

And necessity of the taking for public use must be shown. (State ex rel. Ami Co. v. Superior Court, 42 Wash. 675.)

But it is the character and not the extent of the use that governs. (State ex rel. Ami Co. v. Superior Court, 42 Wash. 675; Lewis County v. Gordon, 20 Wash. 80.)

As to latter part in regard to summoning of jury, see Laws 1905, p. 270, repealing same; O. R. & N. Co. v. McCormick, 46 Wash. 45.

§ 467. Trial—Assessment of Damages—Judgment.

[§ 926, Rem.-Bal.] A judge of the superior court shall preside at the trial, which shall be held at such time as the court, or judge thereof, may direct, at the courthouse in the county where the land, real estate, premises, or other property sought to be appropriated is situated, and the jurors at such trial shall make in each case a separate assessment of damages which shall result to any person, corporation or company, or to the state, or to any county, by reason of the appropriation and use of such land, real estate, premises or other property by such corporation as aforesaid for any and all corporate purposes, and shall ascertain, determine, and award the amount of damages to be paid to said owner or owners respectively, and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such land, real estate, premises, or other property, for the purpose of such enterprise, irrespective of any benefit from any improvement proposed by such corporation. Upon the trial, witnesses may be examined in behalf of either party to the proceedings, as in civil actions; and a witness served with a subpoena in such proceeding shall be punished for failure to appear at such trial, or for perjury, as upon a trial of a civil action. Upon the verdict of the jury, judgment shall be entered for the amount of the damages awarded to such owner or owners respectively, and to all tenants, encumbrancers, and others interested, for the taking or in-

juriously affecting such land, real estate, premises, or other property. In case a jury is waived as in civil cases in courts of record in the manner prescribed by law, the compensation to be paid for the property sought to be appropriated shall be ascertained and determined by the court, or the judge thereof, and the proceedings shall be the same as in trials of an issue of fact by the court. [Laws 1890, § 5, p. 297; 2 H. C., § 652; Bal., 5641.]

Property cannot be taken until payment is made (Puyallup v. Lacey, 43 Wash. 110), and the measure of damages is the value of the land taken and the depreciation of land not taken (Seattle etc. Co. v. Roeder, 30 Wash. 244), without allowance for benefits. (Enoch v. Railway Co., 6 Wash. 393.)

Except that benefits may be allowed municipality. (Lincoln County v. Brock, 37 Wash. 14; Jones v. Seattle, 23 Wash. 753.)

No formal pleadings or issues are required by the statute. (Railway Co. v. Murphine, 4 Wash. 448.)

The value of land is not determined by the unwillingness of owner to sell or by price which adjacent owners ask, but by the uses to which it may be put and the value thereof. (Port Townsend R. Co. v. Barbare, 46 Wash. 275; Chicago etc. R. Co. v. Alexander, 47 Wash. 131; Seattle etc. R. Co. v. Roeder, 30 Wash. 244.)

Petitioner has burden of proof and privilege to open and close on question of damages. (Bellingham etc. Ry. Co. v. Strand, 4 Wash. 311.)

It is discretionary with the court to allow the jury to view the premises. (Seattle etc. R. Co. v. Roeder, 30 Wash. 244.)

§ 468. Judgment and Decree of Appropriation.

[§ 927, Rem.–Bal.] At the time of rendering judgment for damages, whether upon default or trial, if the damages awarded be then paid, or upon their payment, if not paid at the time of rendering such judgment, the court, or judge thereof, shall also enter a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated, thereby vesting the legal title to the same in the corporation seeking to appropriate such land, real estate, premises, right of way, or other property for corporate purposes. Whenever said judgment or decree of appropriation shall affect lands, real estate, or other premises, a certified copy of such judgment or decree of appropriation may be filed for record in the office of the auditor of the county

where the said land, real estate, or other premises are situated, and shall be recorded by said auditor like a deed of real estate, and with like effect. If the title to said land, real estate, premises, or other property attempted to be acquired is found to be defective from any cause, the corporation may again institute proceedings to acquire the same, as in this chapter provided. [Laws 1891, § 1, p. 84; 2 H. C., § 653; Bal., § 5642.]

Qualified title only, i. e., so far as is necessary for the public use, is vested in the condemner. (Neitzel v. Spokane Int. R. Co., 65 Wash. 100, 117 Pac. 864.)

Judgment and adjudication not binding on owner not made party (Owen v. St. Paul etc. Ry. Co., 12 Wash. 314); but the judgment is conclusive on parties in interest served (Compton v. Seattle, 38 Wash. 514); unless it be irregular on its face, when it will be set aside (Seattle etc. Ry. Co. v. Johnson, 7 Wash. 97).

Title acquired is not absolute but to the extent required for the public use. (Kakeldy v. Columbia etc. R. Co., 37 Wash. 675; Nicomen Boom Co. v. North Shore etc. Co., 40 Wash. 315.)

Where property taken for public use is subject to mortgage, the mortgage attaches to the damages awarded. (National Bank of Seattle v. Johnson, 16 Wash. 536.)

§ 468a. Filing Decree in Case of Lands Owned by State.

[§ 928, Rem.–Bal.] When a decree is entered appropriating lands owned by the state, or in which the state has an interest, before any such decree shall be effective, the plaintiff shall cause to be filed in the office of the Commissioner of Public Lands a certified copy of such decree, together with a plat of the lands appropriated and contiguous thereto, in form and substance as prescribed and required by the Board of State Land Commissioners, showing in detail the lands appropriated, together with the amount of damages fixed and awarded in the decree. Upon receipt of such decree, plat and damages, the Commissioner of Public Lands shall examine the same, and if he shall find that the final decree and proceedings comply with the original petition and notice and any amendment duly authorized, and that no additional interest of the state has been taken or appropriated through error or mistake, he shall cause nota-

tions thereof to be made upon the abstracts, records and tract books of his office, and shall issue to the plaintiff his certificate, reciting compliance, in substance, with the requirements of this act, particularly describing the lands appropriated, and thereupon the appropriation shall become effective and the Commissioner of Public Lands shall forthwith transmit the amount received as damages to the State Treasurer, as in the case of the sale of land, and the subdivision of land through which such right of way is appropriated shall thereafter be sold or leased subject to the right of way. [Laws 1909, p. 625, § 1.]

§ 469. Damages may be Paid into Court.

[§ 929, Rem.–Bal.] Upon the entry of judgment upon the verdict of the jury, or the decision of the court, or judge thereof, awarding damages, as hereinbefore prescribed, the petitioner, or any officer of or other person duly appointed by said corporation, may make payment of the damages assessed to the parties entitled to the same, and of the costs of the proceedings, by depositing the same with the clerk of said superior court, to be paid out under the direction of the court, or judge thereof; and upon making such payment into the court of the damages assessed and allowed, and of the costs to any land, real estate, premises, or other property mentioned in said petition, such corporation shall be released and discharged from any and all further liability therefor, unless upon appeal the owner, or other person or party interested, shall recover a greater amount of damages; and in that case, only for the amount in excess of the sum paid into said court, and the costs of appeal: Provided, that in case of an appeal to the supreme court of the state by any party to the proceedings, the money so paid into the superior court by such corporation as aforesaid shall remain in the custody of said court until the final determination of the proceedings by the said supreme court. [Laws 1890, § 7, p. 299; 2 H. C., § 654; Bal., § 5643.]

Sufficient for the condemner to pay the amount awarded into court for the party entitled. (Silverstone v. Harn, 66 Wash. 440, 120 Pac. 109.)

§ 470. Disposition of Money—Conflicting Claims.

[§ 930, Rem.–Bal.] Any person, corporation, state or county, claiming to be entitled to any money paid into court, as provided in this chapter may apply to the court therefor, and upon furnishing evidence satisfactory to the court that he or it is entitled to the same, the court shall make an order directing the payment to such claimant the portion of such money as he or it shall be found entitled to; but if, upon application, the court, or judge thereof, shall decide that the title to the land, real estate, premises, or other property specified in the application of such claimant, was in such condition as to require that an action be commenced to determine the conflicting claims thereto, he shall refuse such order until such action is commenced, and the conflicting claims to such land, real estate, premises, or other property be determined according to law. [Laws 1890, § 8, p. 299; 2 H. C., § 655; Bal., § 5644.]

§ 471. Appeal.

[§ 931, Rem.–Bal.] Either party may appeal from the judgment for damages entered in the superior court to the supreme court of the state within thirty days after the entry of judgment as aforesaid, and such appeal shall bring before the supreme court the propriety and justness of the amount of damages in respect to the parties to the appeal: Provided, however, that no bond shall be required of any person interested in the property sought to be appropriated by such corporation, but in case the corporation appropriating such land, real estate, premises or other property is appellant, it shall give a bond like that prescribed in the next following section, to be executed, filed, and approved in the same manner: And provided further, that if the owner of the land, real estate, premises, or other property, accepts the sum awarded by the jury, the court, or the judge thereof, he shall be deemed thereby to have waived conclusively an appeal to the supreme court, and final judgment by default may be rendered in the superior court as in other cases. [Laws 1890, § 9, p. 300; Bal., § 5645.]

No appeal lies except as to justness and propriety of damages awarded. (Olympia L. & P. Co. v. Tumwater etc. Co., 55 Wash. 392, 104 Pac. 778.)

Writ of review must be prosecuted within thirty days from entry of judgment. (State ex rel. Tumwater Co. v. Superior Court, 56 Wash. 287, 105 Pac. 815.)

No appeal lies from order refusing to vacate adjudication for public use. (North Coast R. Co. v. Gentry, 58 Wash. 80, 107 Pac. 1059.)

Verdict of jury cannot be disturbed if there is evidence to sustain it. (Chicago, Milwaukee etc. R. Co. v. Thayer, 65 Wash. 402, 118 Pac. 318.)

§ 472. Appeal shall not Delay Work.

[§ 932, Rem.–Bal.] The construction of any railway surface tramway, elevated cable tramway or canal, or the prosecution of any works or improvements, by any corporation as aforesaid, shall not be hindered, delayed or prevented by the prosecution of the appeal of any party to the proceedings: Provided, the corporation aforesaid shall execute and file with the clerk of the court in which the appeal is pending a bond, to be approved by said clerk, with sufficient sureties, conditioned that the persons executing the same shall pay whatever amount may be required by the judgment of the court therein, and abide any rule or order of the court in relation to the matter in controversy. [Laws 1897, § 2, p. 64; 2 H. C., § 657; Bal., § 5646.]

Appeal must be taken within thirty days. (Seattle etc. Ry. Co. v. O'Meara, 4 Wash. 17.)

General statute regulating appeals is not applicable (Western etc. Co. v. St. Ann. Co., 22 Wash. 158); appeal bond by corporation appellant necessary (Port Angeles etc. R. Co. v. Cooke, 38 Wash. 184).

Special statute re appeals exclusive. (Tacoma v. Co., 50 Wash. 683.)

§ 473. Appropriation of Right of Way Through Defiles, etc.

[§ 933, Rem.–Bal.] Any railroad company whose right of way passes through any canyon, pass, or defile shall not prevent any other railroad company from the use and occupancy of said canyon, pass, or defile for the purpose of its road in common with the road first located or the crossing of other railroads at grade, and any railroad company, authorized by law to appropriate land, real estate, premises, or other prop-

erty for right of way, or any other corporate purposes may present a petition in the manner and form hereinbefore provided for the appropriation of a right of way through any canyon, pass or defile for the purpose of its road, where right of way has already been located, condemned or occupied by some other railroad company through such canyon, pass, or defile for the purpose of its road, and thereupon like proceedings shall be had upon such petition as herein provided in other cases; and at the time of rendering judgment for damages, whether upon default or trial, the court, or judge thereof, shall enter a judgment or decree authorizing said railroad company to occupy and use said right of way, roadbed, and tract, if necessary, in common with the railroad company or companies already occupying or owning the same, and defining the terms and conditions upon which the same shall be so occupied and used in common. [Laws 1890, § 12, p. 301; 2 H. C., § 658; Bal., § 5647.]

Section construed. (Seattle etc. Co. v. State, 7 Wash. 150, 164; North. Coast R. Co. v. North. Pac. R. Co., 48 Wash. 529.)

§ 473a. Ways of Necessity.

An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity or to construct and maintain any drain, flume or ditch, on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be. The term "private way of necessity," as used in this act, shall mean and include a right of way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals or other valuable

materials and products may be transported and carried. [Laws 1913, c. 133, § 1.]

§ 473b. Condemnation of Ways of Necessity.

The procedure for the condemnation of land for a private way of necessity or for drains, flumes or ditches under the provisions of this act shall be the same as that provided for the condemnation of private property by railroad companies, but no private property shall be taken or damaged until the compensation to be made therefor shall have been ascertained and paid as provided in the case of condemnation by railroad companies. [Laws 1913, c. 133, § 2.]

§ 473c. Duty as Common Carriers.

That any person or corporation availing themselves of the provisions of this act for the purpose of acquiring a right of way for a logging road, as a condition precedent, contract and agree to carry and convey over such roads to either termini thereof any of the timber or other produce of the lands through which such right is acquired at any and all times, so long as said road is maintained and operated, and at reasonable prices; and a failure so to do shall terminate such right of way. The reasonableness of the rate shall be subject to determination by the public service commission. [Laws 1913, c. 133, § 3.]

APPROPRIATION OF LANDS AND HIGHWAYS FOR CORPORATE PURPOSES.

§ 474. Right to Enter Lands for Survey, etc.

[§ 8739, Rem.–Bal.] A corporation organized for the construction of any railway, macadamized road, plank road, clay road, canal or bridge, shall have a right to enter upon any land, real estate or premises, or any of the lands granted to the state of Washington for school, university or other purposes, between the termini thereof, for the purpose of examining, locating and surveying the line of such road or canal, or the site of such bridge, doing no unnecessary damage thereby. [Laws 1895, § 1, p. 146; Cd. 1881, § 2455; 1 H. C., § 1569; Bal., § 4333.]

Condemnation of land held in trust for the public as a city street not authorized. (State ex rel. Schade Co. v. Superior Court, 62 Wash. 96, 113 Pac. 576.)

A railroad company having changed its location may condemn land. (State ex rel. Sylvester v. Superior Court, 64 Wash. 594, 117 Pac. 487. See Rem. & Bal. Code, sec. 8738.)

Tide lands could not be condemned until authorized by statute. (See next section; Seattle & M. Ry. v. State, 7 Wash. 150.)

§ 475. Extent of Right of Appropriation.

[§ 8740, Rem.–Bal.] Every corporation organized for the construction of any railway, macadamized road, plank road, clay road, canal or bridge, is hereby authorized and empowered to appropriate, by condemnation, land and any interest in land or contract right relating thereto, including any leasehold interest therein and any rights of way for tunnels beneath the surface of the land, and any elevated rights of way above the surface thereof, including lands granted to the state for university, school or other purposes, and also tide and shore lands belonging to the state (but not including harbor areas), which may be necessary for the line of such road, railway or canal, or site of such bridge, not exceeding two hun-

dred feet in width, besides a sufficient quantity thereof for toll-houses, workshops, materials for construction, excavations and embankments and a right of way over adjacent lands or property, to enable such corporation to construct and prepare its road, railway, canal or bridge, and to make proper drains; and in case of a canal, whenever the court shall deem it necessary, to appropriate a sufficient quantity of land, including lands granted to the state for university, school or other purposes, in addition to that before specified in this section, for the construction and excavation of such canal and of the slopes and bermes thereof, not exceeding one thousand feet in total width; and in case of a railway to appropriate a sufficient quantity of any such land, including lands granted to the state for university, schools and other purposes and also tide and shore lands belonging to the state (but not including harbor areas), in addition to that before specified in this section, for the necessary sidetracks, depots and water stations, and the right to conduct water thereto by aqueduct, and for yards, terminal, transfer and switching grounds, docks and warehouses required for receiving, delivering, storage and handling of freight, and such land, or any interest therein, as may be necessary for the security and safety of the public in the construction, maintenance and operation of its railways; compensation therefor to be made to the owner thereof irrespective of any benefit from any improvement proposed by such corporation, in the manner provided by law: And provided further, that if such corporation locate the bed of such railway or canal upon any part of the track now occupied by any established state or county road, said corporation shall be responsible to the county commissioners of said county or counties in which such state or county road so appropriated is located, for all expenses incurred by such county or counties in relocating and opening the part of such road so appropriated. The term land as herein used includes tide and shore lands but not harbor areas; it also includes any interest in land or contract right relating thereto, including any leasehold interest therein. [Laws 1907, § 1, p. 674; Cd. 1881, § 2456; 1 H. C., § 1570; Bal., § 4334.]

Railroad constructing its road will be protected from appropriation of its terminals. (State ex rel. Spokane Falls & N. R. Co. v. Superior Court, 40 Wash. 389, 82 Pac. 417.)

Right of way for railroad is public use. (State ex rel. Smith v. Superior Court, 30 Wash. 219, 70 Pac. 484; State ex rel. Trimble v. Superior Court, 31 Wash. 445, 72 Pac. 89; State ex rel. Harlan v. Centralia Co., 42 Wash. 632, 85 Pac. 344.)

No constitutional or statutory prohibition to crossing abutting harbor area. (State ex rel. Hulme v. Gray's Harbor etc. Co., 54 Wash. 530, 103 Pac. 809.)

This section does not permit railways to condemn public avenues. (State ex rel. Schade etc. Co. v. Superior Court, 62 Wash. 96, 113 Pac. 576.)

A railroad company having changed its location may condemn land. (State ex rel. Sylvester v. Superior Court, 64 Wash. 594, 117 Pac. 487.)

Attempt to agree with owner not condition precedent to condemnation. (State ex rel. Boom Co. v. Superior Court, 47 Wash. 166.)

Railroad right of way across public land is subject to settler's rights, which must be condemned if appropriated. (Slaght v. Northern Pac. R. Co., 39 Wash. 576.)

Railway company by constructing its road over unsurveyed public land by such definite location gets title as against subsequent locator of mining claim. (Penn. Min. etc. Co. v. Everette etc. R. Co., 29 Wash. 102.)

§ 476. Right to Cross Other Roads, etc.

[§ 8736, Rem.–Bal.] Every corporation formed under this chapter for the construction of a railroad shall have the power to cross, intersect, join and unite its railway with any other railway before constructed, at any point in its route, and upon the grounds of such other railway company, with the necessary turnouts, sidings, switches and other conveniences in furtherance of the objects of its connections, and every corporation whose railway is or shall be hereafter intersected by any new railway shall unite with the corporation owning such new railway in forming such intersections and connections and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossing and connections, the same shall be ascertained and determined in the manner provided by law for the taking of lands and other property which shall be necessary for the construction of its road, and every corporation formed under this chapter for the construction of

a canal shall have the power to cross and intersect any railway before constructed at any point in its road and upon the grounds of such other railway company, and every corporation whose railway is or shall hereafter be crossed or intersected by any canal shall unite with the corporation owning such canal in forming such crossings and intersections and grant the facilities therefor; and if the two corporations cannot agree upon the compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined in the manner provided by law for the taking of lands and other property which shall be necessary for the construction of said canal. [Laws 1895, § 3, p. 148; Cd. 1881, § 2456½; 1 H. C., § 1571; Bal., § 4335.)

One public or quasi-public corporation may condemn property of another not interfering with the public use by the latter company; e. g., railroad crossings and connections. (Seattle & M. R. Co. v. Bellingham Bay & R. Co., 29 Wash. 491, 69 Pac. 1107; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551; State ex rel. Spokane Falls & N. R. Co. v. Superior Court, 40 Wash. 389, 82 Pac. 417.)

Question of necessity of crossing a judicial one for the court. (State ex rel. Postal Tel. etc. Co. v. Superior Court, 64 Wash. 189, 116 Pac. 855.)

In condemnation of crossing of existing railroad, installing necessary interlocking device proper element in compensation, but future tracks not so. (State ex rel. North. Coast R. Co. v. R. Co., 49 Wash. 78.)

Railroad company may condemn crossing over existing railroad where necessary only, but must interfere as little as possible with prior use. (State ex rel. Kent Lumber Co. v. Superior Court, 46 Wash. 516; State ex rel. Portland etc. Co. v. Superior Court, 45 Wash. 270; Seattle & M. Ry. Co. v. State, 7 Wash. 150.)

§ 477. Construction Over Rivers, etc.—Conditions.

[§ 8737, Rem.–Bal.] Every corporation formed under the laws of this state for the construction of railroads or canals shall possess the power to construct its railway or canal, as the case may be, across, along or upon any river, stream of water, watercourses, plank road, turnpike or canal, which the route of such railway or canal shall intersect or touch; but such corporation shall restore the river, stream, watercourse, plank road or turnpike thus intersected or touched to its former state

as near as may be, and pay any damages caused by such construction: Provided, that the construction of any railway or canal by such corporation along, across or upon any of the navigable rivers or waters of this state shall be in such manner as to not interfere with, impede or obstruct the navigation thereof; and all rights, privileges and powers of every description by law conferred upon road or railroad companies are hereby given and granted to canal companies so far as the same may be applicable, and all power and authority possessed by the public or municipal corporations of the state or their local authorities, with reference to road or railroad companies, may be exercised by them with reference to canal companies.. [Laws 1895, § 4, p. 148; 1 H. C., § 1572; Bal., § 4336.]

No constitutional or statutory prohibition to crossing abutting harbor area. (State ex rel. Hulme v. Gray's Harbor R. Co., 54 Wash. 530, 103 Pac. 809.)

§ 477a. Change of Grade or Location.

[§ 8738, Rem.–Bal.] Any corporation may change the grade or location of its road or canal, not departing from the general route specified in the articles of incorporation, for the purposes of avoiding annoyances to public travel, or dangerous or deficient curves or grades, or unsafe or unsubstantial grounds or foundation, or for other like reasonable causes, and for the accomplishment of such change shall have the same right to enter upon, examine, survey, and appropriate the necessary lands and materials as in the original location and construction of such road or canal. [Laws 1869, p. 343, § 3; Cd. 1881, § 2457; 1 H. C., § 1573; Bal., § 4337.]

§ 478. Eminent Domain—Telegraph and Telephone Companies.

[§ 9300, Rem.–Bal.] The right of eminent domain is hereby extended to all telegraph and telephone corporations and companies organized or doing business in this state. [Laws 1890, § 1, p. 292; 1 H. C., § 1547; Bal., § 4355.]

A company may condemn land in accordance with its special charter or subsequent general law. (Cascades R. Co. v. Johns, 1 Wash. Ter. 557.)

§ 479. Telegraph and Telephone Companies may Condemn.

[§ 9301, Rem.–Bal.] Every corporation incorporated under the laws of this state or any state or territory of the United States for the purpose of constructing, operating or maintaining any telegraph or telephone in this state, shall have the right to enter upon any land between the termini of its proposed lines of telegraph or telephone for the purpose of examining, locating and surveying the line of such telegraph or telephone, doing no unnecessary damage thereby. [Laws 1888, § 1, p. 65; 1 H. C., § 1548; Bal., § 4356.]

§ 480. Extent—Right to Railway Line.

[§ 9304, Rem.–Bal.] Such telegraph or telephone company may appropriate so much land as may be actually necessary for its line of telegraph or telephone, with the right to enter upon lands immediately adjacent thereto, for the purpose of constructing, maintaining and operating its line and making all necessary repairs. Such telegraph or telephone company may also, for the purpose aforesaid, enter upon and appropriate such portion of the right of way of any railroad company as may be necessary for the construction, maintenance and operation of its telegraph or telephone line: Provided, however, that such appropriation shall not obstruct such railroad or the travel thereupon, nor interfere with the operation of such railroad. [Laws 1888, § 2, p. 66; 1 H. C., § 1549; Bal., § 4359.]

§ 481. Mining Companies — Reduction Works — Eminent Domain.

[§ 7344, Rem.–Bal.] The right of eminent domain is hereby extended to all corporations incorporated or that may hereafter be incorporated under the laws of this state or any state or territory of the United States, and doing business in this state, for the purpose of acquiring, owning or operating mines,

mills, or reduction works, or mining or milling gold and silver or other minerals, which may desire to erect and operate surface tramways or elevated cable tramways for the purpose of carrying, conveying or transporting the products of such mines, mills or reduction works. [Laws 1897, § 1, p. 95; Bal., § 4282.]

A company may condemn land in accordance with its special charter or subsequent general law. (Cascades R. Co. v. Sohms, 1 Wash. Ter. 557.)

§ 482. Right to Enter Lands for Survey, etc.

[§ 7345, Rem.–Bal.] Every corporation incorporated or that may hereafter be incorporated under the laws of this state or any state or territory of the United States, and doing business in this state, for the purpose of acquiring, owning or operating mines, mills or reduction works, or mining or milling gold and silver or other minerals, which may desire to erect and operate surface tramways or elevated cable tramways for the purpose of carrying, conveying or transporting the products of such mines, mills or reduction works, shall have the right to enter upon any land between the termini of the proposed lines for the purpose of examining, locating and surveying such lines, doing no unnecessary damage thereby. [Laws 1897, § 2, p. 95; Bal., § 4283.]

§ 483. Procedure as in Other Cases.

[§ 7346, Rem.–Bal.] Every such corporation shall have the right to appropriate real estate or other property for right of way in the same manner and under the same procedure as now is or may be hereafter provided by the law in the case of other corporations authorized by the laws of this state to exercise the right of eminent domain. [Laws 1897, § 3, p. 95; Bal., § 4284.]

§ 484. Electric Railways may Condemn.

[See §§ 9080, 9081, Rem.–Bal.] The right of eminent domain is hereby extended to all corporations incorporated or that may hereafter be incorporated under the laws of this state or any state or territory of the United States and doing business in this state for the purpose of transmitting electric power

by wire, cable or by any other means; or for operating railways or railroads by electric power: Provided, however, that said right of eminent domain shall not be exercised with respect to any residence or business structure or structures, public road or street. [Laws 1899, § 1, p. 147.]

§ 485. Right to Enter Lands for Survey, etc.

[§ 9083, Rem.–Bal.] Every such corporation shall have the right to enter upon any land between the termini of the proposed lines for the purpose of examining, locating and surveying such lines, doing no unnecessary damage thereby. [Laws 1899, § 2, p. 147.]

"Such" means electric power and electric railroad companies. (Laws 1899, sec. 1, p. 147.)

§ 486. Procedure as in Other Cases.

[See §§ 9080, 9081, Rem.–Bal.] Every such corporation shall have the right, subject to the proviso contained in section 1 hereof [9080, Rem.–Bal.], to appropriate real estate or other property for right of way or for any corporate purposes in the manner and under the same procedure as now is or may hereafter be provided by law in the case of other corporations authorized by the laws of this state to exercise the right of eminent domain. [Laws 1899, § 3, p. 148.]

"Such" means electric power and electric railroad companies. (Laws 1899, sec. 1, p. 147.)

§ 487. Electric Power Companies may Condemn.

[§ 934, Rem.–Bal.] The right of eminent domain is hereby extended to all corporations incorporated or that may hereafter be incorporated under the laws of this state or any state or territory of the United States, and doing business in this state, for the purpose of transmitting electric power by wire, cable or by any other means: Provided, however, that said right of eminent domain shall not be exercised in respect to any residence or business structure or structures. [Laws 1895, § 1, p. 80; Bal., § 5648.]

A company may condemn land in accordance with its special charter or subsequent general law. (Cascades R. Co. v. Sohms, 1 Wash. Ter. 557.)

A private company generating power to be sold at profit cannot by offering to serve the public acquire right of eminent domain. (Tolt Power etc. Co. v. Superior Court, 50 Wash. 13, 96 Pac. 519.)

§ 488. Right to Enter Lands for Survey, etc.

[§ 935, Rem.–Bal.] Every corporation incorporated or that may hereafter be incorporated under the laws of this state or any state or territory of the United States, and doing business in this state, for the purpose of transmitting electric power by wire, cable or any other means, shall have the right to enter upon any land between the termini of the proposed lines for the purpose of examining, locating and surveying such lines, doing no unnecessary damage thereby. [Laws 1895, § 2, p. 80; Bal., § 5649.]

§ 489. Procedure as in Other Cases.

[§ 936, Rem.–Bal.] Every such corporation shall have the right, subject to the proviso contained in section 1 hereof [934, Rem.–Bal], to appropriate real estate or other property for right of way or for any corporate purposes in the same manner and under the same procedure as now is or may be hereafter provided by the law in the case of other corporations authorized by the laws of this state to exercise the right of eminent domain. [Laws 1895, § 3, p. 80; Bal., § 5650.]

§ 490. Water Power Companies may Condemn.

[§ 9506, Rem.–Bal.] The right of eminent domain for the purpose of appropriating real estate is hereby extended to all corporations that are now or that may hereafter be incorporated under the laws of this state, or of any state or territory of the United States and doing business in this state, for the purpose of conveying water by ditches, flumes, pipe-lines, tunnels or any other means for the utilization of water power: Provided, however, that said right of eminent domain shall not be exercised in respect to any residence or business structure or structures. [Laws 1901, § 1, p. 299.]

A company may condemn land in accordance with its special charter or subsequent general law. (Cascades R. Co. v. Sohms, 1 Wash. Ter. 557.)

A private company generating power to be sold at profit cannot by offering to serve the public acquire right of eminent domain. (State ex rel. Tolt Power etc. Co. v. Superior Court, 50 Wash. 13, 96 Pac. 519.)

§ 491. Right to Enter Lands for Survey, etc.

[§ 9507, Rem.–Bal.] Every corporation that is now or that may hereafter be incorporated under the laws of this state, or of any other state or territory of the United States and doing business in this state, for the purpose of conveying water by ditches, flumes, pipe-lines, tunnels or any other means for the utilization of water power shall have the right to enter upon any land between the termini of the proposed ditches, flumes, pipe-lines, tunnels or any other means for the utilization of water power, for the purpose of examining, locating and surveying such ditches, flumes, pipe-lines, tunnels or any other means for the utilization of water-power, doing no unnecessary damage thereby. [Laws 1901, § 2, p. 299.]

§ 492. Procedure as in Other Cases.

[§ 9508, Rem.–Bal.] Every such corporation shall have the right, subject to the proviso contained in section 1 hereof [9506, Rem.–Bal.], to appropriate real estate or other property for a right of way for such ditches, flumes, pipe-lines, tunnels or other means of conveying water, and for any other corporate purposes, in the same manner and under the same procedure as now is or may be hereafter provided by law in the case of other corporations authorized by the laws of the state to exercise the right of eminent domain. [Laws 1901, § 3, p. 300.]

§ 493. Canal and Irrigation Companies may Condemn.

[§ 9510, Rem.–Bal.] All corporations, authorized to do business in this state, and who have been or may hereafter be organized for the purpose of erecting and maintaining flumes and aqueducts to convey water for consumption for mining, irrigation, milling or other industrial purposes, shall have the same right to appropriate lands for necessary corporate purposes, and under the same regulations and instructions as are provided for other corporations; and such corporations organized for such purposes, in order to carry out the object

of their incorporation, are authorized to take and use any water not otherwise legally appropriated. [Laws 1879, § 1, p. 134; Cd. 1881, § 2472; 1 H. C., § 1587; Bal., § 4281a.]

A company may condemn land in accordance with its special charter or subsequent general law. (Cascades R. Co. v. Sohms, 1 Wash. Ter. 557.)

Irrigation company is farming corporation authorized by laws of 1873. (Ellis v. Pomeroy Imp. Co., 1 Wash. 572, 21 Pac. 27.)

§ 494. Right of Easement.

There is hereby granted to persons, firms and corporations organized among other things, for irrigation and power purposes, the right to construct and maintain dams and works incident thereto, over, upon and across the beds of the rivers of the state of Washington in connection with such power and irrigation purposes, and there is hereby granted to such persons, firms and corporations an easement over, upon and across the beds of such rivers for such purposes. Such easement shall be limited, however, to so much of the beds of such rivers as may be reasonably convenient and necessary for such uses. All such dams and works shall be completed within five years after the commencement of construction work upon the same. The rights and privileges granted by this act shall inure to the benefit of such persons, firms or corporations from the date of the commencement of construction work upon such dams and works incident thereto, and such construction work shall be diligently prosecuted to completion, and the rights, privileges and easements granted by this act shall continue so long as the same shall be utilized by the grantees for the purposes herein specified, and the failure to maintain and use such dams and works after the same shall have been constructed, for a continuous period of two years, shall operate as a forfeiture of all the rights hereby granted and the same shall revert to the state of Washington: Provided, that nothing in this act shall be construed in such a way as to interfere with the use of said rivers for navigation purposes, and all of such rights, privileges and easements granted hereby shall be subject to the paramount control of such rivers for navigation purposes by the United States: And provided further, that the use and

enjoyment of the grants and privileges of this act shall not interfere with the lawful and rightful diversion of the waters of said rivers by other parties under water appropriations in existence at the time any such persons, firms or corporations shall avail themselves of the benefits and privileges of this act, but no such persons, firms or corporations shall have any right to construct any such dams or works over, upon or across the land between ordinary high water and extreme low water of any river of this state without first having acquired the right to do so from the owner or owners of the lands adjoining the land between ordinary high water and extreme low water over or across which said dam or works are constructed. [Laws 1911, p. 436.]

§ 495. May Sell Electric Power and Light—Shall be Deemed Public Service Corporation.

[§ 4974, Rem.–Bal.] Any corporation authorized to do business in this state, which, under the present laws of the state, is authorized to condemn property for the purpose of generating and transmitting electrical power for the operation of railroads or railways, or for municipal lighting, and which by its charter or articles of incorporation, assumes the additional right to sell electric power and electric light to private consumers outside the limits of a municipality and to sell electric power to private consumers within the limits of a municipality, which shall provide in its articles that in respect of the purposes mentioned in this section it will assume and undertake to the state and to the inhabitants thereof the duties and obligations of a public service corporation, shall be deemed to be in respect of such purposes a public service corporation, and shall be held to all the duties, obligations and control, which by law are or may be imposed upon public service corporations. Any such corporation shall have the right to sell electric light outside the limits of a municipality and electric power both inside and outside such limits to private consumers from the electricity generated and transmitted by it for public purposes and not needed by it therefor: Provided, that such corporation shall furnish such excess

power at equal rates, quantity and conditions considered, to all consumers alike, and shall supply it to the first applicants therefor until the amount available shall be exhausted: Provided, further, that no such corporation shall be obliged to furnish such excess power to any one consumer to an amount exceeding twenty-five per cent of the total amount of such excess power generated or transmitted by it. In exercising the power of eminent domain for public purposes it shall not be an objection thereto that a portion of the electric current generated will be applied to private purposes, provided the principal uses intended are public: Provided, that all public service or quasi-public service corporations shall at no time sell, deliver and dispose of electrical power in bulk to manufacturing concerns at the expense of its public service functions, and any person, firm or corporation that is a patron of such corporation as to such public function, shall have the right to apply to any court of competent jurisdiction to correct any violation of the provisions of this act. [Laws 1907, § 1, p. 349.]

A private company generating power to be sold at profit cannot, by offering to serve the public, acquire the right of eminent domain. (State ex rel. Tolt Power etc. Co. v. Superior Court, 50 Wash. 13, 96 Pac. 519.)

Condemnation of water-power for generating electric power to be supplied municipal and public lighting and common carrying railroads is for authorized public use (State ex rel. Dominick v. Superior Court, 52 Wash. 196); but generating power for commercial purposes generally is not public use. (State ex rel. Shropshire v. Superior Court, 51 Wash. 386.)

§ 496. Electricity not to be Used for Private Enterprises.

[§ 4975, Rem.–Bal.] Whenever any corporation has acquired any property by decree of appropriation based on proceedings in court under the provisions of this act, no portion of the electricity generated or transmitted by it by means of the property appropriated under the provisions of this act shall be used or applied by such corporation for or to a business or trade not under the present laws deemed public or quasi-public conducted by itself. [Laws 1907, § 2, p. 350.]

Sale of electric power to the public not public use. (State ex rel. Harris v. Superior Court, 42 Wash. 660, 85 Pac. 666.)

A private company generating power to be sold at profit cannot, by offering to serve the public, acquire the right of eminent domain. (State ex rel. Tolt Power etc. Co. v. Superior Court, 50 Wash. 13, 96 Pac. 519.)

§ 497. Violation Forfeiture of Franchise.

[§ 4976, Rem.–Bal.] In the event of the violation of any of the requirements of this act by any corporation availing itself of its provisions, an appropriate suit may be maintained in the name of the state upon the relation of the attorney general, or if he shall refuse or neglect to act upon the relation of any individual aggrieved by the violation or violations, complained of, to compel such corporation to comply with the requirements of this act. A violation of this act shall cause the forfeiture of the corporate franchise if the corporation refuses or neglects to comply with the orders with respect thereto made in the suit herein provided for. [Laws 1907, § 3, p. 350.]

RAILROAD CORPORATIONS AND OTHER TRANSPORTATION COMPANIES.

§ 498. Railroad may Build Branch Lines.

[§ 8662, Rem.–Bal.] Any railroad corporation chartered by, or organized under, the laws of the state, or of any state or territory, or under the laws of the United States, and authorized to do business in this state, may extend its railroad from any point named in its charter or articles of incorporation, or may build branch roads either from any point on its line of road or from any point on the line of any other railroad connecting, or to be connected, with its road, the use of which other road between such points and the connection with its own road such corporation shall have secured by lease or agreement for a term of not less than ten years from its date; before making any such extension or building any such branch road, such corporation shall, by resolution of its directors or trustees, to be entered in the record of its proceedings, designate the route of such proposed extension or branch by indicating the place from and to which said railroad is to be constructed, and the estimated length of such railroad, and the name of each county in this state through or into which it is constructed or intended to be constructed, and file a copy of such record, certified by the president and secretary, in the office of the Secretary of State, who shall indorse thereon the date of the filing thereof and record the same. Thereupon such corporation shall have all the rights and privileges to make such extension or build such branch and receive aid thereto which it would have had if it had been authorized in its charter or articles of incorporation. [Laws 1890, § 1, p. 526; 1 H. C., § 1535; Bal., § 4303.]

Charter authority to build specified branch does not authorize branches generally, and under Hill's Code, section 1535 (Bal. Code, sec. 4303), copy of designated route must be filed with the Secretary of State. (Biles v. Tacoma etc. R. Co., 5 Wash. 509, 32 Pac. 211.)

In the absence of legislation, mandamus will issue to compel a railroad to stop trains and furnish a depot where public need requires it.

(Northern Pacific R. Co. v. Territory ex rel. Dustin, 3 Wash. Ter. 303, 13 Pac. 604; reversed, 142 U. S. 492.)

A railroad company which has constructed its road on unsurveyed public land has right thereto against subsequent locator of mining claim. (Penn. Min. & I. Co. v. Everett & M. C. R. Co., 29 Wash. 102, 69 Pac. 628.)

Grant of railroad right of way across public lands does not attach to settler's land until after condemnation. (Slaght v. Northern Pac. R. Co., 39 Wash. 576, 81 Pac. 1062.)

A railroad right of way is an easement and not a fee unless latter is granted expressly. (Reichenbach v. Wash. Short Line R. Co., 10 Wash. 357, 38 Pac. 1126.)

Railroad crossing another must accommodate itself to the established way of the latter. (Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551.)

Lessor railroad company liable for damages for failure to fence as required by law. (Oregon R. & Nav. Co. v. Dacres, 1 Wash. 195, 23 Pac. 415.)

The fact that a car leaves the track establishes a defect in the track or machinery, or want of proper operation. (Walker v. McNeill, 17 Wash. 582, 50 Pac. 518; Roberts v. Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.)

The act of 1907, page 530, section 3, conferring on the state railroad commission authority to order trackage connections is not unlawful delegation of legislative power. (State ex rel. Oregon R. & Nav. Co. v. Railroad Com., 52 Wash. 17, 100 Pac. 179.)

Soliciting agent advertised as "general agent" is not agent to receive service of process under Ballinger's Code, section 4875. (Arrow Lumber etc. Co. v. Union Pacific R. Co., 53 Wash. 629, 102 Pac. 650.)

Under Laws of 1907, page 538, state railroad commission has power to order track connections between different railways. (State ex rel. Oregon etc. R. Co. v. Railroad Commission, 52 Wash. 17, 100 Pac. 179.)

Where a domestic railway company adopted its location at directors' meeting held in another state, subsequent bringing of condemnation proceedings in the state is sufficient adoption. (State ex rel. Biddle v. Superior Court, 44 Wash. 108, 87 Pac. 40.)

An order of the railroad commission requiring a railroad depot to be moved five hundred feet in town of seventy-five people to bring it nearer business center unreasonable. (State ex rel. Gt. Northern R. Co. v. Railroad Commission, 60 Wash. 218, 110 Pac. 1075.)

Railroad fence act of 1893, Remington and Ballinger's Code, section 8729, is impliedly repealed by acts of 1903 and 1907, Remington and Ballinger's Code, section 8730, providing that owner shall have right to put in gates. (Huffman v. Oregon R. & Nav. Co., 57 Wash. 494, 107 Pac. 362.)

§ 499. Consolidation of Railroads—Leases, etc.

[§ 8665, Rem.–Bal.] That any railroad company now or hereafter incorporated, pursuant to the laws of this state or of the United States, or of any state or territory of the United States, may at any time by means of subscription to the capital stock of any other railroad company, or by the purchase of its stock or bonds, or by guaranteeing its bonds, or otherwise, aid such company in the construction of its railroad within or without this state; and any such company owning or operating a railroad within or without this state, may extend the same into this or any other state or territory, and may build, buy, or lease the whole or any part of any other railroad, together with the franchises, powers and immunities and all other property and appurtenances appertaining thereto, whether located within or without this state; or may consolidate with any railroad or railroads in such other state or territory, or with any other railroad in this state, and may operate the same, and may own such real estate and other property in such other state or territory as may be necessary or convenient in the operation of such road; and any such railroad company may sell or lease the whole or any part of its railroad and branches, within or without this state, constructed or to be constructed, together with all property, rights, privileges and franchises appertaining thereto, to any railroad company organized or existing pursuant to the laws of the United States or of this state, or of any other state or territory of the United States; and any railroad company incorporated or existing under the laws of the United States, or of any state or territory of the United States, may extend, construct, maintain and operate its railroad, or any portion or branch thereof, into and through this state, and may build branches from any point on such extension to any place or places within this state, and the railroad company of any other state or territory of the United States which shall so purchase or lease a railroad, or any part thereof in this state, or consolidate with any such railroad in this state, or shall extend or construct its road, or any portion or branch thereof in this state, shall possess and may exercise and enjoy as to the location, control, management

and operation of the said road, and as to the location, construction and operation of any extension or branch thereof, all the rights, powers, privileges and franchises possessed by railroad corporations organized under the laws of this state, including the exercise of the power of eminent domain. Such purchase, sale, consolidation or lease may be made, or such aid furnished, upon such terms or conditions as may be agreed upon by the directors and trustees of the respective companies; but the same shall be approved or ratified by persons holding or representing seventy-five per cent of the capital stock of each of such companies, respectively, at any annual stockholders' meeting, or at a special meeting of the stockholders called for that purpose, or by the approval in writing of seventy-five per cent of the stockholders of each company, respectively. Articles stating the name selected for such consolidated corporation and the terms of such consolidation shall be approved by each corporation by the vote of the stockholders holding seventy-five per cent of the stock, in person or by proxy, at a regular meeting thereof, or a special meeting called for that purpose in the manner provided by the by-laws of the respective consolidating corporations, or by the consent in writing of such seventy-five per cent of such stockholders annexed to such articles; and a copy thereof, with a copy of the records of such approval or consent, duly certified by the respective presidents and secretaries, with the corporate seals of such corporations affixed thereto, shall be filed for record in the office of the Secretary of State, and a copy thereof be furnished to the State Railroad Commission [now Public Service Commission]; and thereupon such consolidating corporations shall be and become one corporation, by the name so selected, which, within this state, shall possess all the powers, franchises, and immunities, including the right of further consolidation with other corporations, and be subject to all the liabilities and restrictions now or hereafter imposed by law: Provided, that no railroad or transportation corporation shall consolidate its stock, property, or franchises with any other railroad or transportation corporation owning a competing line, or purchase either directly or indirectly, any stock or

interest in a railroad or transportation corporation owning or operating a competing line: And provided further, that nothing in the foregoing provisions shall be held or construed as curtailing the right of this state, or of the counties through which any such road or roads may be located, to levy and collect taxes upon the same, and upon the rolling stock thereof, in conformity with the provisions of the laws of this state upon that subject, and all roads or branches thereof in this state so consolidated with, purchased or leased, or aided, or extended into this state, shall be subject to taxation and to regulation and control of its operation by the laws of this state in all respects the same as if constructed by corporations organized under the laws of this state; and any corporation of another state or territory or of the United States, being the purchaser or lessee of a railroad within this state, or extending its railroad or any portion thereof into or through this state, shall establish and maintain an office or offices in this state, at some point or points on its line, at which legal process and notice may be served as upon railroad corporations of this state: Provided further, that before any railroad corporation organized under the laws of any other state or territory, or of the United States, shall be permitted to avail itself of the benefits of this act with respect to any railroad constructed, or to be constructed within this state, such corporation shall file with the Secretary of State a true copy of its charter or articles of incorporation, and otherwise comply with the laws of this state respecting foreign corporations doing business within the state: Provided, that any such consolidation shall be approved by the State Railroad Commission [now Public Service Commission]: Provided further, that, in no case, shall the capital stock of the company formed by such consolidation exceed the sum of the capital stock of the companies so consolidated, at the par value thereof. [Laws 1909, § 1, p. 698; 1 H. C., § 1536.]

Minority stockholders may maintain suit to annul illegal traffic agreement. (Earl v. Seattle etc. R. Co., 56 Fed. 909.)

Two competing roads may legally arrange to take each one-half the stock in a new company opening up new territory. (Cascade R. Co. v. Superior Court, 51 Wash. 346.)

§ 500. Prior Sales, etc., Legalized.

[§ 8666, Rem.–Bal.] Any sale or purchase of and any consolidation by sale, or otherwise, or any lease, or agreement to sell, consolidate with or lease, the whole or any part of any railroad, or the branch lines of any company, whether organized or located within or without this state, with the franchise appertaining thereto, to, from or with any railroad company organized under the laws of the United States or of this state or any other state or territory, or any consolidation between such companies, heretofore executed by the proper officers of the respective companies, parties to such sale, lease or consolidation or contract, is hereby legalized and made in all respects valid and binding from the date of its execution: Provided, that the provisions of this section shall not apply when the railroads or transportation corporations involved are competing lines. [Laws 1909, § 2, p. 701.]

§ 501. Extension in This State of Foreign Lines.

[§ 8668, Rem.–Bal.] Any railroad corporation chartered by or organized under the laws of the United States, or of any state or territory, whose constructed railroad shall reach or intersect the boundary line of this state at any point, may extend its railroad into this state from any such point or points to any place or places within the state, and may build branches from any point on such extension. Before making such extension or building any such branch road, such corporation shall, by resolution of its directors or trustees, to be entered in the record of its proceedings, designate the route of such proposed extension or branch by indicating the place from and to which such extension or branch is to be constructed, and the estimated length of such extension or branch, and the name of each county in this state through or into which it is constructed or intended to be constructed, and file a copy of such record, certified by the president and secretary, in the office of the Secretary of State, who shall indorse thereon the date of filing thereof, and record the same. Thereupon such corporation shall have all the rights and privileges to make such extension or build such branch and receive such aid

thereto as it would have had had it been authorized so to do by articles of incorporation duly filed in accordance with the laws of this state. [Laws 1890, § 3, p. 527; 1 H. C., § 1537; Bal., § 4305.]

Foreign corporation is authorized to construct lines within the state. (Miller v. Griffin, 46 Wash. 489.)

Adoption of location by domestic company at directors' meeting in another state ratified by condemnation proceedings when instituted within the state. (State ex rel. Biddle v. Superior Court, 44 Wash. 108.)

§ 502. May Construct and Maintain Spur Tracks.

[§ 8667, Rem.–Bal.] Any railroad corporation organized under the laws of this state or of any other state, and authorized to do business in this state and owning or operating a railway in this state, may construct, maintain and operate public spur tracks, from its railroad or any branch thereof, to and upon the grounds of any mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber-yard, coal dock or other industry or enterprise, with all sidetracks, storage tracks, wyes, turnouts, and connections necessary or convenient to the use of the same; and such company may acquire by purchase or condemnation, in the manner provided by the laws of this state for the acquisition of real estate for railway purposes, all necessary rights of way for such spur tracks, sidetracks, storage tracks, wyes, turnouts and connections; said spur when constructed to be a public spur for the use of all industries located or thereafter located thereon: Provided, that the right to acquire by condemnation herein granted shall not be exercised over unimproved lands for a greater distance than five miles, or over improved lands for a greater distance than one mile, or over lands within the limits of a municipal corporation for a greater distance than one-fourth of a mile: Provided further, that this act shall not be construed as limiting the rights granted under the operation of the act of March 28, 1890, relating to the construction of branch lines. [Laws 1907, § 1, p. 516.]

§ 503. Subject to Laws of This State.

[§ 8669, Rem.–Bal.] All such railroad corporations, consolidated companies and their branches, including their stock,

property and franchises, within the jurisdiction of this state, shall be subject to and controlled by the constitution and laws of this state. [Laws 1890, § 4, p. 528; 1 H. C., § 1538; Bal., § 4306.]

§ 504. May Build Bridges Over Navigable Streams.

[§ 8670, Rem.–Bal.] Any railroad corporation heretofore duly incorporated and organized under the laws of this state or the territory of Washington, or which may hereafter be duly incorporated and organized under the laws of this state. or heretofore or hereafter incorporated and organized under the laws of any other state or territory of the United States, and authorized to do business in this state and to construct and operate railroads therein, shall have and hereby is given the right to construct bridges across the navigable streams within this state over which the projected line or lines of railway of said railroad corporations will run: Provided, that said bridges are constructed in good faith for the purpose of being made a part of the constructed line of said railroad: And provided, that they shall be constructed in the course of the construction of said railroad or thereafter for the more convenient operation thereof: And provided further, that such bridges shall be so constructed as not to interfere with, impede or obstruct the navigation of such streams. [Laws 1890, § 1, p. 53; 1 H. C., § 1539; Bal., § 4307.]

No constitutional or statutory prohibition to crossing abutting harbor area. (State ex rel. Hulme v. Gray's Harbor R. Co., 54 Wash. 530, 103 Pac. 809.)

Abutting tide and uplands cannot be taken without compensation. (North. Pac. R. Co. v. Slade Lumber Co., 61 Wash. 195, 112 Pac. 240.)

§ 504a. Right to Construct Bridges.

[§ 8671, Rem.–Bal.] . . . . Any corporation, copartnership, person or trustee heretofore or hereafter by any state or municipal law or ordinance authorized to construct and operate railroads, interurban railroads or street railroads as common carriers within this state, shall have and hereby is given, the right to construct bridges or trestles across waterways heretofore or hereafter laid out under the authority of the state

of Washington over which the projected line or lines of railroad will run: Provided, such bridges or trestles are constructed in good faith for the purpose of being made a part of the constructed line of such railroad, and may also have included therewith the purpose of providing a roadway for the accommodation of vehicles and foot-passengers. [Laws 1909, p. 605, § 1.]

§ 505. May Guarantee Irrigation Securities.

[§ 8663, Rem.–Bal.] It shall be lawful for any corporation, whether such corporation is organized under the laws of the territory or state of Washington, the laws of any other state or territory, or the laws of the United States, owning, leasing or operating any line or lines of railway within the state of Washington, or which may own, lease or operate in the future any such line or lines of railway within this state, to take, acquire, own, negotiate, sell and guarantee bonds and stocks of companies or corporations which are or may hereafter be organized for the purpose of irrigating and reclaiming lands within this state. [Laws 1890, § 1, p. 529; 1 H. C., § 1543; Bal., § 4311.]

§ 506. May Build Ditches.

[§ 8664, Rem.–Bal.] It shall be lawful for any such corporation to build, own and operate irrigating ditches and canals in this state for the purpose of irrigating and reclaiming arid lands, contiguous to or tributary to such line or lines of railway. [Laws 1890, § 2, p. 529; 1 H. C., § 1544; Bal., § 4312.]

Irrigation ditch is public use. (Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635; Weed v. Goodwin, 36 Wash. 31, 78 Pac. 36.)

§ 507. Authority to Construct — How and by Whom Granted.

[§ 4972, Rem.–Bal.] The legislative authority of the city or town having control of any public street or road, or, where such street or road is not within the limits of any incorporated city or town, then the board of county commissioners of the

county wherein such road or street is situated, may grant authority for the construction, maintenance and operation of transmission lines for transmitting electric power, together with poles, wires and other appurtenances, upon, over, along and across any such public street or road, and in granting such authority the legislative authority of such city or town, or the board of county commissioners as the case may be, may prescribe the terms and conditions on which such transmission line and its appurtenances, shall be constructed, maintained and operated upon, over, along and across such road or street, and the grade or elevation at which the same shall be constructed, maintained and operated: Provided, that hereafter on application being made to the board of county commissioners for such authority, the board shall fix a time and place for hearing the same, and shall cause the county auditor to give public notice thereof at the expense of the applicant, by posting written or printed notices in three public places in the county seat of the county, and in at least one conspicuous place on the road or street or part thereof, for which application is made, at least fifteen days before the day fixed for such hearing, and by publishing a like notice three times in some daily newspaper published in the county, or if no daily newspaper is published in the county, then the newspaper doing the county printing, the last publication to be at least five days before the day fixed for such hearing, which notice shall state the name or names of the applicant or applicants, a description of the roads or streets or parts thereof for which the application is made, and the time and place fixed for the hearing. Such hearing may be adjourned from time to time by order of the board. If after such hearing the board shall deem it to be for the public interest to grant such authority in whole or in part, the board may make and enter the proper order granting the authority applied for or such part thereof as the board deems to be for the public interest, and shall require such transmission line and its appurtenances to be placed in such location on or along the road or street as the board finds will cause the least interference with other uses of the road or street. In case any such trans-

mission line is or shall be located in part on private right of way, the owner thereof shall have the right to construct and operate the same across any county road or county street which intersects such private right of way, if such crossing is so constructed and maintained as to do no unnecessary damage: Provided, that any person or corporation constructing such crossing or operating such transmission line on or along such county road or county street shall be liable to the county for all necessary expense incurred in restoring such county road or county street to a suitable condition for travel. [Laws 1903, § 1, p. 360.]

General authority to amend city charter does not authorize amendment overriding statute on special subject. (Benton v. Seattle Electric Co., 50 Wash. 157, 96 Pac. 1033.)

§ 508. May Lease or Purchase Property of Other Corporations.

[§ 4973, Rem.–Bal.] Any corporation incorporated or that may hereafter be incorporated under the laws of this state or any state or territory of the United States, for the purpose of manufacturing, transmitting or selling electric power, may lease or purchase and operate (except in cases where such lease or purchase is prohibited by the constitution of this state) the whole or any part of the plant for manufacturing or distributing electric power or energy of any other corporation, heretofore or hereafter constructed, together with the franchises, powers, immunities and all other property or appurtenances appertaining thereto: Provided, that such lease or purchase has been or shall be consented to by stockholders of record holding at least two-thirds in amount of the capital stock of the lessor or grantor corporation; and all such leases and purchases heretofore made or entered into by consent of stockholders as aforesaid are for all intents and purposes hereby ratified and confirmed, saving, however, any vested rights of private parties. [Laws 1903, § 3, p. 362.]

HIGHWAY AND GRADE CROSSINGS.

§ 510. Definitions.

The term "commission," when used in this act, means the Public Service Commission of Washington.

The term "highway," when used in this act, includes all state and county roads, streets, alleys, avenues, boulevards, parkways, and other public places actually open and in use, or to be opened and used, for travel by the public.

The term "railroad," when used in this act, means every railroad, including interurban and suburban electric railroads, by whatsoever power operated, for the public use in the conveyance of persons or property for hire, with all bridges, ferries, tunnels, equipment, switches, spurs, sidings, tracks, stations and terminal facilities of every kind, used, operated, controlled, managed, or owned by or in connection therewith. The said term shall also include every logging and other industrial railway owned or operated primarily for the purpose of carrying the property of its owners or operators or of a limited class of persons, with all tracks, spurs and sidings used in connection therewith. The said term shall not include street railways operating within the limits of any incorporated city or town.

The term "railroad company," when used in this act, includes every corporation, company, association, joint stock association, partnership or person, its, their or his lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any railroad, as that term is defined in this section.

The term "over-crossing," when used in this act, means any point or place where a highway crosses a railroad by passing above the same.

The term "under-crossing," when used in this act, means any point or place where a highway crosses a railroad by passing under the same.

The term "over-crossing" or "under-crossing," shall also mean any point or place where one railroad crosses another railroad not at grade.

The term "grade crossing," when used in this act, means any point or place where a railroad crosses a highway or a highway crosses a railroad or one railroad crosses another, at a common grade. [Laws 1913, c. 30, § 1.]

§ 510a. Grade Crossing Prohibited.

All railroads and extensions of railroads hereafter constructed shall cross existing railroads and highways by passing either over or under the same, when practicable, and shall in no instance cross any railroad or highway at grade without authority first being obtained from the commission to do so. All highways and extensions of highways hereafter laid out and constructed shall cross existing railroads by passing either over or under the same, when practicable, and shall in no instance cross any railroad at grade without authority first being obtained from the commission to do so: Provided, that this section shall not be construed to prohibit a railroad company from constructing tracks at grades across other tracks owned or operated by it within established yard limits. In determining whether a separation of grades is practicable, the commission shall take into consideration the amount and character of travel on the railroad and on the highway; the grade and alignment of the railroad and the highway; the cost of separating grades; the topography of the country, and all other circumstances and conditions naturally involved in such an inquiry. [Laws 1913, c. 30, § 2.]

§ 510b. Petitions for New Crossings.

Whenever any railroad company desires to cross any highway or railroad at grade, it shall file a written petition with the commission setting forth the reasons why the crossing cannot be made either above or below grade, and whenever the county commissioners of any county, or the municipal authorities of any city or town, or the state officers authorized to lay out and construct state roads, desire to lay out or extend any highway across any railroad at grade, they shall file a written petition with the commission, setting forth the reasons why the crossing cannot be made either

above or below grade. Upon receiving such petition the commission shall immediately investigate the same, giving at least ten days' notice to the railroad company or companies and the county or municipality affected thereby, of the time and place of such investigation, to the end that all parties interested may be present and be heard. If the highway involved is a state road, the state highway commissioner shall be notified of the time and place of hearing. The evidence introduced shall be reduced to writing and be filed by the commission. If the commission finds that it is not practicable to cross the railroad or highway either above or below grade, it shall make and file a written order in the cause, granting the right and privilege to construct a grade crossing. The commission, in its discretion, may provide in the order authorizing the construction of a grade crossing, or at any subsequent time, that the railroad company shall install and maintain proper signals, warnings, flagmen, interlocking devices, or other devices or means to secure the safety of the public and its employees. If upon investigation the commission shall find that it is impracticable to construct an over-crossing or under-crossing on the established or proposed highway, and shall find that by deflecting the established or proposed highway a practicable and feasible over-crossing or under-crossing or a safer grade crossing can be provided, it shall continue the hearing on the petition and hold a supplemental hearing thereon. At least ten days' notice of the time and place of such supplemental hearing shall be given to all land owners that may be affected by the proposed change in location of the highway. At such supplemental hearing the commission shall inquire into the propriety, advisability and necessity of changing and deflecting the highway as proposed for the purpose of securing an over-crossing, under-crossing, or safer grade crossing. If the proposed change in route of the highway involves the abandonment and vacation of a portion of an established highway, the owners of land contiguous to the portion of the highway to be vacated and abandoned shall, in like manner, be notified of the time and place of the supplemental hearing. At the conclusion of the hearing on

the petition, the commission shall make and file its findings of fact in writing concerning the matters inquired into, and shall determine the location of the crossing which may be constructed, and whether the same shall be an under-crossing, over-crossing, or grade crossing, and shall determine whether or not any proposed change in the route of an existing highway, or the abandonment of a portion thereof is advisable or necessary to secure an over-crossing, under-crossing, or safer grade crossing. If the commission shall find and determine that a change in route of an existing highway, or abandonment and vacation of a portion thereof is necessary or advisable, it shall further find and determine what private lands, property, or property rights, if any, it is necessary to take, damage, or injuriously affect, for the purpose of laying out and constructing the highway along a new route, and what private lands, property, or property rights, if any, will be affected by the proposed abandonment and vacation of a portion of an existing highway. The lands, property, and property rights found necessary to be taken, damaged, or affected shall be described in said findings with reasonable accuracy, and the right to take, damage or injuriously affect the same shall be acquired as hereinafter provided. In any action brought to acquire the right to take, damage, or injuriously affect any such lands, property, or property rights, the findings of the commission shall be conclusive as to the necessity for taking, damaging, or injuriously affecting the same. A copy of said findings shall be served upon all parties to the cause. [Laws 1913, c. 30, § 3.]

§ 510c. Petitions for Change in Existing Crossings.

The mayor and city council, or other governing body of any city or town, or the county commissioners of any county within which any highway is crossed by any railroad, or any railroad company whose road is crossed by any highway, may file with the commission their or its petition in writing, alleging that the public safety requires an alteration in the method and manner of such crossing, and its approaches, the location of the highway or crossing, the closing or dis-

continuance of an existing highway crossing, and the diversion of travel thereon to another highway or crossing or if not practicable to change such crossing from grade or to close and discontinue the same, the opening of an additional crossing for the partial diversion of travel and praying that the same may be ordered. Upon such petition being filed, the commission shall fix a time and place for hearing the petition and shall give not less than ten days' notice thereof to the petitioner, the railroad company and the municipality or county in which the crossing is situate. If the highway involved is a state highway, like notice shall be given to the state highway commissioner. If the change petitioned for requires that private lands, property, or property rights be taken, damaged, or injuriously affected to open up a new route for the highway, or requires that any portion of any existing highway be vacated and abandoned, ten days' notice of the hearing shall be given to the owner or owners of the private lands, property, and property rights which it is necessary to take, damage or injuriously affect, and to the owner or owners of the private lands, property, or property rights that will be affected by the proposed vacation and abandonment of the existing highway. The commission shall also cause said notice of hearing to be published once in some newspaper of general circulation in the community where such crossing is situate, which publication shall appear at least two days prior to the date of hearing. At the time and place fixed in the notice, all persons and parties interested shall be entitled to be heard and introduce evidence. At the conclusion of the hearing the commission shall make and file its written findings of fact concerning the matters inquired into in like manner as provided in the preceding section for findings of fact upon petition for new crossings. The commission shall also enter its order based upon said findings of fact, which shall specify whether the highway shall continue at grade or whether it shall be changed to cross over or under the railroad or whether said highway shall be closed and travel thereon diverted to another channel, or any other change that the commission may find advisable or necessary. In case the order made requires that

private lands, property, or property rights be taken, damaged, or injuriously affected, the right to take, damage, or injuriously affect the same shall be acquired as hereinafter provided.

Petition for the change in any existing grade crossing, or for the elimination thereof, may be filed by the commission on its own motion, and proceedings thereon shall be the same as herein provided for the hearing and determination of a petition filed by a railroad company. [Laws 1913, c. 30, § 4.]

§ 510d. Duty to Maintain Crossings.

When a highway crosses a railroad by an over-crossing or under-crossing, the framework and abutments of the over-crossing or under-crossing, as the case may be, shall be maintained and kept in repair by the railroad company, and the roadway thereover or thereunder and approaches thereto shall be maintained and kept in repair by the county or municipality in which the same are situated, or if the highway is a state road, the roadway over or under the railroad shall be maintained and kept in repair as provided by law for the maintenance and repair of state roads: Provided, however, that this section shall not apply to over-crossings or under-crossings constructed prior to the passage of this act under special contracts between a railroad company and any county, municipality, or the state, in which different provisions is made for the maintenance and repair of the under-crossing or over-crossing. [Laws 1913, c. 30, § 5.]

§ 510e. Apportionment of Cost of Crossings.

Subdivision A.

Whenever, under the provisions of this act, new railroads are constructed across existing highways, or highway changes are made either for the purpose of avoiding grade crossings on such new railroads, or for the purpose of crossing at a safer and more accessible point than otherwise available, the entire expense of crossing above or below the grade of the

existing highway, or changing the route thereof, for the purpose mentioned in this subdivision, shall be paid by the railroad company.

Subdivision B.

Whenever, under the provisions of this act, a new highway is constructed across a railroad, or an existing grade crossing is eliminated or changed, the entire expense of constructing an over-crossing, under-crossing, or safer grade crossing, as the case may be, shall be apportioned by the commission between the railroad, municipality or county affected, or if the highway is a state road, between the railroad and the state, as justice may require, regard being had for the benefits accruing to the railroad, municipality, county, or state by reason of the improvement. If the highway involved is a state road, the amount not apportioned to the railroad company shall be paid as provided by law for constructing such state road. When an existing grade crossing is ordered eliminated by the construction of an over-crossing or under-crossing, the commission may in its discretion pay an amount not to exceed ten per cent of the cost thereof out of the appropriation provided in this act, and in such cases the state auditor is hereby authorized and required upon the requisition of the commission, to draw warrants on the state treasury payable to the party designated by the commission for such amount, and the state treasurer is hereby authorized and required to pay such warrants on presentation.

Subdivision C.

Whenever two or more lines of railroad owned or operated by different companies cross a highway, or each other, by an over-crossing, under-crossing or grade crossing required or permitted by this act or by an order of the commission, the portion of the expense of making such crossing not chargeable to any municipality, county, or to the state, shall be apportioned between said railroad companies by the commission unless said companies shall mutually agree upon an apportionment. If it becomes necessary for the commission to make an apportionment between the railroad companies, a hearing for that purpose shall be held, at least ten days' notice of which shall be given. [Laws 1913, c. 30, § 6.]

§ 510f. Payment of Costs and Apportionment of Construction Work.

In the construction of new railroads across existing highways, the railroads shall do or cause to be done all the work of constructing the crossings and road changes that may be required, and shall acquire and furnish whatever property or easements may be necessary, and shall pay, as provided in the preceding section, the entire expense of such work including all compensation or damages for property or property rights taken, damaged or injuriously affected. In all other cases the construction work may be apportioned by the commission between the parties who may be required to contribute to the cost thereof as the parties may agree, or as the commission may consider advisable. All work within the limits of railroad rights of way shall in every case be done by the railroad company owning or operating the same. The cost of acquiring additional lands, rights or easements to provide for the change of existing crossings shall, unless the parties otherwise agree, in the first instance be paid by the municipality or county within which the crossing is located; or in the case of a state road, shall be paid in the manner provided by law for paying the cost of acquiring lands, rights or easements for the construction of state roads. The expense accruing on account of property taken or damaged shall be divided and paid in the manner provided for dividing and paying other costs of construction. Upon the completion of the work and its approval by the commission, an accounting shall be had, and if it shall appear that any party has expended more than its proportion of the total cost, a settlement shall be forthwith made. If the parties shall be unable to agree upon a settlement, the commission shall arbitrate, adjust and settle the account after notice to the parties. In the event of failure and refusal of any party to pay its proportion of the expense, the sum with interest from the date of the settlement may be recovered in a civil action by the party entitled thereto. In cases where the commission has settled the account, the finding of the commission as to the amount due shall be conclusive in any civil action brought to recover the same if such finding has not been reviewed or appealed from

as herein provided, and the time for review or appeal has expired. If any party shall review or appeal from any findings or order of the commission apportioning the cost between the parties liable therefor, the superior court or the supreme court, as the case may be, shall cause judgment to be entered in such review proceedings for such sum or sums as may be found lawfully or justly due by one party to another. [Laws 1913, c. 30, § 7.]

§ 510g. Plans and Specifications—Proposals.

Plans and specifications of changes in existing crossings proposed under this act, and an estimate of the expense thereof, shall be submitted to the commission for its approval before the commencement of the work. In case the work is to be done by contract, the proposals of the contractor shall be submitted to the commission and if it shall determine that the bids are excessive it shall have power to require the submission of new proposals. [Laws 1913, c. 30, § 8.]

§ 510h. Temporary Crossings.

The commission, in ifs discretion, good cause appearing therefor, and upon such conditions as it may prescribe, shall have power, without notice or hearing, to grant a permit to construct and maintain a temporary grade crossing for a period not exceeding six months, and may revoke such permit at any time: Provided, that nothing contained in this section shall be construed to prohibit the commission, after notice and investigation, from permitting the maintenance of a temporary grade crossing for a longer period than six months. Any order granting, refusing to grant, or revoking a permit for a temporary grade crossing shall not be reviewable. [Laws 1913, c. 30, § 9.]

§ 510i. The Commission may Fix Time.

The commission, in any order requiring work to be done, shall have power to fix the time within which the same shall be performed and completed: Provided, that if any party having a duty to perform within a fixed time under any order of the commission shall make it appear to the commission

that the order cannot reasonably be complied with within the time fixed by reason either of facts arising after the entry of the order or of facts existing prior to the entry thereof that were not presented, and with reasonable diligence could not have been sooner presented to the commission, such party shall be entitled to a reasonable extension of time within which to perform the work. An order of the commission refusing to grant an extension of time may be reviewed as provided for the review of other orders of the commission. [Laws 1913, c. 30, § 10.]

§ 510j. Practice and Procedure Before Commission.

Modes of procedure under this act, unless herein otherwise provided, shall be as provided in The Public Service Commission law, being chapter 117, of the Laws of 1911 for procedure under that act. The commission is hereby given power to adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings under this act. [Laws 1913, c. 30, § 11.]

§ 510k. Notices—Form and Manner of Service.

All notices required to be served by this act shall be in writing, and shall briefly state the nature of the matter to be inquired into and investigated. Notices may be served in the manner provided by law for the service of summons in civil cases, or by registered United States mail. When service is made by registered mail, the receipt of the receiving postoffice shall be sufficient proof of service. When, under the provisions of this act, it is necessary to serve notice of hearing before the commission on owners of private lands, property, or property rights, and such owners cannot be found, service may be made by publication in the manner provided by law for the publication of summons in civil actions, except that publication need be made but once each week for three consecutive weeks, and the hearings may be held at any time after the expiration of thirty days from the date of the first publication of the notice. [Laws 1913, c. 30, § 12.]

§ 5101. Review and Appeal.

Upon the petition of any party to a proceeding before the commission, any finding or findings, or order or orders of the commission, made under color of authority of this act, except as otherwise provided in section 9 [§ 510h, ante], may be reviewed in the superior court of the county in which the crossing is located and the reasonableness and lawfulness of such finding or findings, order or orders inquired into and determined, as provided in the Public Service Commission Law (Laws 1911, c. 117), for the review of findings and orders made under that act. An appeal may be taken to the supreme court from the judgment of the superior court in like manner as provided in said public service commission law for appeals to the supreme court. [Laws 1913, c. 30, § 13.]

§ 510m. Employment of Engineers and Other Employees.

The commission may employ temporarily such experts, engineers, and inspectors as may be necessary to supervise changes in existing crossings undertaken under this act; the expense thereof shall be paid by the railroad upon the request and certificate of the commission, said expense to be included in the cost of the particular change of grade on account of which it is incurred, and apportioned as provided in this act.

The commission may also employ such engineers and other persons as permanent employees as may be necessary to properly administer this act, and the expense thereof shall be paid out of the appropriation herein provided. [Laws 1913, c. 30, § 14.]

§ 510n. Eminent Domain.

Whenever to carry out any work undertaken under this act it is necessary to take, damage, or injuriously affect any private lands, property, or property rights, the right so to take, damage, or injuriously affect the same may be acquired by condemnation as hereinafter provided.

Subdivision A.

In cases where new railroads are constructed and laid out by railroad company authorized to exercise the power of emi-

nent domain, the right to take, damage, or injuriously affect private lands, property, or property rights shall be acquired by the railroad company by a condemnation proceedings brought in its own name and prosecuted as provided by law for the exercise of the power of eminent domain by railroad companies, and the right of eminent domain is hereby conferred on railroad companies for the purpose of carrying out the requirements of this act or the requirements of any order of the commission.

Subdivision B.

In cases where it is necessary to take, damage, or injuriously affect private lands, property, or property rights to permit the opening of a new highway or highway crossing across a railroad, the right to take, damage, or injuriously affect such lands, property, or property rights shall be acquired by the municipality or county petitioning for such new crossing by a condemnation proceeding brought in the name of such municipality or county as provided by law for the exercise of the power of eminent domain by such municipality or county. If the highway involved be a state highway, then the right to take, damage, or injuriously affect private lands, property, or property rights shall be acquired by a condemnation proceeding prosecuted under the laws relative to the exercise of the power of eminent domain in aid of such state road.

Subdivision C.

In cases where the commission orders changes in existing crossings to secure an under-crossing, over-crossing, or safer grade crossing, and it is necessary to take, damage, or injuriously affect private lands, property, or property rights to execute the work, the right to take, damage, or injuriously affect such lands, property, or property rights shall be acquired in a condemnation proceeding prosecuted in the name of the state of Washington by the attorney general under the laws relating to the exercise of the power of eminent domain by cities of the first class for street and highway purposes: Provided, however, that in the cases mentioned in this subdivision the full value of any lands taken shall be awarded, together with damages, if any accruing to the remainder of

the land not taken by reason of the severance of the part taken, but in computing the damages to the remainder, if any, the jury shall offset against such damages, if any, the special benefits, if any, accruing to such remainder by reason of the proposed improvement. The right of eminent domain for the purposes mentioned in this subdivision is hereby granted. [Laws 1913, c. 30, § 15.]

§ 510o. Illegal Crossings may be Enjoined or Abated as Nuisances.

If an under-crossing, over-crossing, or grade crossing is constructed, maintained, or operated, or is about to be constructed, operated, or maintained, in violation of the provisions of this act, or in violation of any order of the commission, such construction, operation, or maintenance may be enjoined, or may be abated, as provided by law for the abatement of nuisances. Suits to enjoin or abate may be brought by the attorney general, or by the prosecuting attorney of the county in which the unauthorized crossing is located. [Laws 1913, c. 30, § 16.]

§ 510p. Mandamus.

If any railroad company, county, municipality, or officers thereof, or other person, shall fail, neglect, or refuse to perform or discharge any duty required of it or them under this act or any order of the commission, the performance of such duty may be compelled by mandamus, or other appropriate proceeding, prosecuted by the attorney general upon the request of the commission. [Laws 1913, c. 30, § 17.]

§ 510q. Penalty for Violation by Railroad.

If any railroad company shall fail or neglect to obey, comply with, or carry out the requirements of this act, or any order of the commission made under it, such company shall be liable to a penalty not to exceed $5,000.00, such penalty to be recovered in a civil action brought in the name of the state of Washington by the attorney general. All penalties recovered shall be paid into the state treasury. [Laws 1913, c. 30, § 18.]

§ 510s. Erection and Maintenance of Posts, Piers and Abutments in Highways.

Whenever, to carry out any work ordered under this act, it is necessary to erect and maintain posts, piers, or abutments in a highway, the right and authority to erect and maintain the same is hereby granted. [Laws 1913, c. 30, § 19.]

§ 510t. No New Right of Action Conferred.

Nothing contained in this act shall be construed as conferring a right of action for the abandonment or vacation of any existing highway or portion thereof in cases where no right of action exists independent of this act. [Laws 1913, c. 30, § 20.]

§ 510u. Act When not Operative.

This act shall not be operative within the limits of cities authorized to frame their own charters, and it shall not be construed to apply to street railway lines operating in, on, through, along, over, or across any street, alley or other public place within the limits of any incorporated city or town, except that no street-car line outside of cities authorized to frame their own charters shall cross a railroad at grade without express authority from the commission. [Laws 1910, c. 30, § 21.]

§ 510v. Constitutionality.

If any section, subdivision, sentence, or clause of this act is for any reason held to be unconditional, such decision shall not affect the validity of the remaining portions of this act. [Laws 1910, c. 30, § 22.]

§ 510w. Repeal.

Chapter 162 of the Laws of 1909, entitled, "An act to regulate the manner in which railroads shall cross highways and other railroads and the manner in which highways shall cross railroads in the State of Washington," approved March 17, 1909, and all other acts and parts of acts in conflict with this act, are hereby repealed: Provided, however, that proceedings on applications for grade crossings pending before the

commission at the time this act takes effect may be concluded and determined under existing laws. [Laws 1913, c. 30, § 23.]

§ 510x. Appropriation.

There is hereby appropriated out of the general fund the sum of twenty-five thousand ($25,000.00) dollars or so much thereof as may be necessary to pay the cost of administering this act and the state's proportion of the cost of grade separation made under the provisions of this act. [Laws 1913, c. 30, § 24.]

ELECTRIC RAILWAY COMPANIES.

§ 511. Authority to Construct — How and by Whom Granted.

[§ 9080, Rem.–Bal.] The legislative authority of the city or town having control of any public street or road, or where such street or road is not within the limits of any incorporated city or town, then the board of county commissioners wherein such road or street is situated, may grant authority for the construction, maintenance and operation of electric railroads or railways, motor railroads or railways and railroads and railways of which the motive power is any power other than steam, together with such poles, wires and other appurtenances upon, over, along and across any such public street or road and in granting such authority the legislative authority of such city or town or the board of county commissioners, as the case may be, may prescribe the terms and conditions on which such railroads, or railways and their appurtenances shall be constructed, maintained and operated upon, over, along and across such road or street, and the grade or elevation at which the same shall be maintained and operated: Provided, that hereafter, on application being made to the board of county commissioners for such authority, the board shall fix a time and place for hearing the same, and shall cause the county auditor to give public notice thereof at the expense of the applicant, by posting written or printed notices in three public places in the county seat of the county, and in at least one conspicuous place on the road or street or part thereof, for which application is made, at least thirty days before the day fixed for such hearing, and by publishing a like notice three times in some daily newspaper published in the county, or if no daily newspaper is published in the county, then the newspaper doing the county printing, the last publication to be at least five days before the day fixed for such hearing, which notice shall state the name or names of the applicant or applicants, a description of the

roads or streets or parts thereof for which the application is made, and the time and place fixed for the hearing. Such hearing may be adjourned from time to time by order of the board. If, after such hearing, the board shall deem it to be for the public interest to grant such authority in whole or in part, the board may make and enter the proper order granting the authority applied for or such part thereof as the board deems to be for the public interest, and shall require such railroad or railway and its appurtenances to be placed in such location on or along the road or street as the board finds will cause the least interference with other uses of the road or street. In case any such railroad or railway is, or shall be located in part on private right of way, the owner thereof shall have the right to construct and operate the same across any county road or county street which intersects such private right of way, if such crossing is so constructed and maintained as to do no unnecessary damage: Provided, that any person or corporation constructing such crossing or operating such railroad or railway on or along such county road or public street shall be liable to the county for all necessary expense incurred in restoring such county road or public street to a suitable condition for travel. [Laws 1907, § 1, p. 192.]

Street railway franchise granted by mayor and counsel valid without vote of the people. (Benton v. Seattle Elec. Co., 50 Wash. 156, 96 Pac. 1033.)

Laws of 1907, page 192, supersedes city charter of Seattle, requiring franchises to be sold at public auction to highest bidder. (Ewing v. Seattle, 55 Wash. 229, 104 Pac. 259.)

A city, in granting a franchise to a street railway company, may not devest itself of its police power. (Tacoma v. Boutelle, 61 Wash. 434, 112 Pac. 661.)

An ordinance requiring a street railway to transport passengers to city limits and give transfers for one fare of five cents is operative on territory annexed to the city. (Peterson v. Tacoma R. & Power Co., 60 Wash. 406, 111 Pac. 338.)

An ordinance requiring a street-car company to equip its cars with fenders is reasonable police regulation. (Tecker v. Seattle Renton etc. R. Co., 60 Wash. 570, 111 Pac. 791.)

A clause in a franchise restricted to existing street railways to be acquired does not apply to old system. (McGilvra v. Seattle Elec. Co., 61 Wash. 38, 111 Pac. 896.)

A company's franchise requiring the giving of transfers does not compel giving transfers on competing line, the capital stock of which had been acquired by company also holding the stock of the company whose franchise contained said requirement. (State ex rel. Tacoma v. Tacoma R. etc. Co., 61 Wash. 507, 112 Pac. 506.)

A provision in a franchise requiring two trips a day means minimum service. (Tacoma v. Boutelle, 61 Wash. 434, 112 Pac. 661.)

A franchise authorizing a company to employ either electricity or cable power authorizes the company to use both at the same time. (McGilvra v. Seattle Elec. Co., 61 Wash. 38, 111 Pac. 896.)

§ 512. Eminent Domain—May Appropriate Land for Right of Way.

[§ 9081, Rem.–Bal.] Every corporation incorporated or that may hereafter be incorporated under the laws of this state, or of any other state or territory of the United States and doing business in this state for the purpose of operating railroads or railways by electric power, shall have the right to appropriate real estate and other property for right of way or for any corporate purpose, in the same manner and under the same procedure as now is or may hereafter be provided by law in the case of ordinary railroad corporations authorized by the laws of this state to exercise the right of eminent domain: Provided, that such right of eminent domain shall not be exercised with respect to any public road or street until the location of the electric railroad or railway thereon has been authorized in accordance with section 1 of this act [9080, Rem.–Bal.]. [Laws 1903, § 2, p. 366.]

A company may condemn land in accordance with its special charter or subsequent general law. (Cascades R. Co. v. Sohms, 1 Wash. Ter. 557.)

Street railway public use. (State ex rel. Harlan v. Centralia Co., 42 Wash. 632, 85 Pac. 344.)

Street railway has power of eminent domain, but proceeding to determine damages to easements of light and air by construction of trestle roadway on dedicated street is not condemnation of the street. (State ex rel. Smith v. Superior Court, 30 Wash. 219.)

Street railway may condemn property for power plant. (State ex rel. Harlan v. Centralia etc. Co., 42 Wash. 632.)

§ 513. May Lease or Purchase Property of Other Corporations.

[§ 9082, Rem.–Bal.] Any corporation incorporated or that may hereafter be incorporated under the laws of this state or any state or territory of the United States for the purpose of constructing, owning or operating railroads or railways by electric power, may lease or purchase and operate (except in cases where such lease or purchase is prohibited by the constitution of this state) the whole or any part of the electric railroad or electric railway, of any other corporation heretofore or hereafter constructed, together with the franchises, powers, immunities and all other property or appurtenances appertaining thereto: Provided, that such lease or purchase has been or shall be consented to by stockholders of record holding at least two-thirds in amount of the capital stock of the lessor or grantor corporation; and all such leases and purchases heretofore made or entered into by consent of stockholders as aforesaid are for all intents and purposes hereby ratified and confirmed, saving, however, any vested rights of private parties. [Laws 1903, § 3, p. 366.]

[§ 9083, Rem.–Bal.] Every such corporation shall have the right to enter upon any land between the termini of the proposed lines for the purpose of examining, locating, and surveying such lines, doing no unnecessary damage thereby. [Laws 1899, § 2, p. 147.]

TELEGRAPH AND TELEPHONE COMPANIES.

§ 514. Right of Eminent Domain Extended to.

[§ 9300, Rem.–Bal.] The right of eminent domain is hereby extended to all telegraph and telephone corporations and companies organized or doing business in the state. [Laws 1890, § 1, p. 292; 1 H. C., § 1547; Bal., § 4355.]

A company may condemn land in accordance with its special charter or subsequent general law. (Cascades R. Co. v. Sohms, 1 Wash. Ter. 557.)

§ 515. Right to Enter Lands for Survey, etc.

[§ 9301, Rem.–Bal.] Every corporation incorporated under the laws of this state, or any state or territory of the United States, for the purpose of constructing, operating or maintaining any telegraph or telephone in this state shall have the right to enter upon any land between the termini of the proposed lines of telegraph or telephone for the purpose of examining, locating and surveying the line of such telegraph or telephone, doing no unnecessary damage thereby. [Laws 1888, § 1, p. 65; 1 H. C., § 1548; Bal., § 4356.]

§ 516. May Use Right of Way of Post Road.

[§ 9302, Rem.–Bal.] Every railroad operated in this state and carrying freight and passengers for hire, or doing business in this state, is and shall be designated a "post road," and the corporation or company owning the same shall allow telegraph and telephone companies to construct and maintain telegraph and telephone lines on and along the right of way of such railroad. [Laws 1890, § 3, p. 292; 1 H. C., § 1545; Bal., § 4357.]

§ 517. Discrimination in Rates, Facilities, etc., Prohibited.

[§ 9303, Rem.–Bal.] No railroad corporation or company organized or doing business in this state shall allow any telegraph or telephone company, or any individual, any facilities, privileges, or rates for transportation of men or materials, or

for repairing their lines, not allowed to all telegraph and telephone companies and individuals. [Laws 1890, § 4, p. 292; 1 H. C., § 1546; Bal., § 4358.]

§ 518. Must Receive and Transmit Messages.

[§ 9305, Rem.–Bal.] Said corporations and companies shall receive, exchange and transmit each other's messages without delay or discrimination, and all telephone companies shall receive and transmit messages for any person. [Laws 1890, § 2, p. 292; 1 H. C., § 1550; Bal., § 4360.]

§ 519. May Use Highways, for Poles, Wires, etc.

[§ 9314, Rem.–Bal.] Any telegraph or telephone corporation or company, or the lessees thereof, doing business in this state, shall have the right to construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street, or highway, along or across the right of way of any railroad corporation, and may erect poles, piers, or abutments for supporting the insulators, wires and any other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the railroad or highway, or interrupt the navigation of the waters. Provided, that when the right of way of such corporation has not been acquired by or through any grant or donation from the United States, or this state, or any county, city or town therein, then the right to construct and maintain such lines shall be secured only by the exercise of right of eminent domain, as provided by law: Provided further, that where the right of way as herein contemplated is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone lines can be erected thereon. [Laws 1890, § 5, p. 292; 1 H. C., § 1561; Bal., § 4369.]

§ 520. Injury to Line—Vessel Dragging Anchor.

[§ 9315, Rem.–Bal.] Any person who injures or destroys, through want of proper care, any necessary or useful fixtures of any telegraph or telephone corporation or company, is liable to the corporation or company for all damages sustained

thereby. Any vessel which, by dragging its anchor or otherwise, breaks, injures or destroys the subaqueous cable of a telegraph or telephone corporation or company, subjects its owners to the damages hereinbefore specified. [Laws 1890, § 6, p. 293; 1 H. C., § 1562; Bal., § 4370.]

§ 521. Malicious Injury.

[§ 9316, Rem.–Bal.] Any person who willfully and maliciously does any injury to any telegraph or telephone property mentioned in the preceding section, is liable to the corporation or company for five times the amount of actual damages sustained thereby, to be recovered in any court of competent jurisdiction. [Laws 1890, § 7, p. 293; 1 H. C., § 1563; Bal., § 4371.]

§ 522. Penalty for Failure to Transmit Messages.

[§ 9317, Rem.–Bal.] In case of the refusal or neglect of any telegraph or telephone corporation to comply with the provisions of section number two [9305, Rem.–Bal.], the penalty for the same shall be a fine of not more than five hundred nor less than one hundred dollars for each offense. [Laws 1890, § 8, p. 293; 1 H. C., § 1564; Bal., § 4372.]

§ 523. Railroad Refusing Privileges.

[§ 9318, Rem.–Bal.] In case of the refusal or neglect of any railroad company or corporation to comply with the provisions of section number three [9302, Rem.–Bal.], said company or corporation shall be liable for damages in the sum of not less than one thousand dollars nor more than five thousand dollars for each offense, and one hundred dollars per day during the continuance thereof. [Laws 1890, § 9, p. 293; 1 H. C., § 1565; Bal., § 4373.]

§ 524. Subaqueous Cables to be Marked.

[§ 9319, Rem.–Bal.] No telegraph or telephone corporation or company can recover damages for the breaking or injury of any subaqueous telegraph cable unless such corporation or company has previously erected on either bank of the waters

under which the cable is placed, a monument indicating the place where the cable lies, and publishes for one month, in some newspaper most likely to give notice to navigators, a notice giving a description and the purpose of the monuments, and the general course, landing and termini of the cable. [Laws 1890, § 10, p. 293; 1 H. C., § 1566; Bal., § 4374.]

BOOM COMPANIES.

§ 525. Boom Companies may Condemn.

[§ 7110, Rem.–Bal.] Any corporation heretofore or hereafter organized in the state of Washington for the purpose of catching, booming, sorting, rafting and holding logs, lumber or other timber products, shall have power to acquire, hold, use and transfer all such real and personal property or estate, by lease or purchase, as shall be necessary for carrying on the business of said corporation. If such corporation shall not be able to agree with persons owning land, shore rights, or other property sought to be appropriated, as to the amount of compensation to be paid therefor, the compensation therefor may be assessed and determined and the appropriation made in the manner provided by law for the appropriation of private property by railways: Provided, that any property acquired under the provisions of this act by the exercise of the right of eminent domain shall be used exclusively for the purposes of this act; and whenever the use of said property as herein contemplated shall cease for a period of one year, the same shall revert to the original owner, his heirs or assigns, upon the repayment of the original cost of same. [Laws 1890, § 1, p. 470; 1 H. C., § 1590; Bal., § 4378.]

A company may condemn land in accordance with its special charter or subsequent general law. (Cascades R. Co. v. Sohms, 1 Wash. Ter. 557.)

A statutory right to form boom companies is a franchise, but not exclusive. (Chehalis Boom Co. v. Chehalis County, 24 Wash. 135, 63 Pac. 1123.)

Boom companies are quasi public and may be given right to condemn. (North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750; Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 Pac. 1046.)

Boom companies are common carriers. (State ex rel. Nicomen Co. v. North S. etc. Co., 55 Wash. 1, 103 Pac. 426, 107 Pac. 196.)

The legislature cannot authorize a boom company to overflow land of riparian owners on navigable river. (Burrows v. Gray's Harbor Boom Co., 44 Wash. 630.)

Use of tide lands not authorized except by purchase or agreement. (Samish Boom Co. v. Calvert, 27 Wash. 611.)

Not monopoly for boom company to control booming of a river where more than one company not feasible. (Nicomen Boom Co. v. North Shore Co., 40 Wash. 315.)

Boom company is quasi-public corporation. (North River Boom Co. v. Smith, 15 Wash. 138.)

§ 526. Filing Plat and Survey.

[§ 7111, Rem.–Bal.] Any corporation hereafter organized for the purpose mentioned in section one of this act [7110, Rem.–Bal.], shall within ninety days after its articles of incorporation have been filed, proceed to file in the office of the Secretary of State a plat or survey of so much of the shore lands or the waters of the state and lands contiguous thereto as are proposed to be appropriated for said purpose by said corporation. Any corporation heretofore organized in the territory of Washington for any of the purposes expressed in section one (1) of this act [7110, Rem.–Bal.], shall file such plat within ninety days after the passage of this act. Such plat shall be made from the records of the United States in the surveyor general's office of this state, or by competent surveyor, subsequent to actual survey. Such corporation may from time to time whenever it desires to extend its operations to portions of streams not embraced in its original plat, or to other streams tributary to the stream or streams described in such original plat, or any portion of such streams, or in any manner to change, modify or correct its original plat, file additional plats or surveys in the office of the Secretary of State, of so much of the shore lines of the waters of the state and lands contiguous thereto as are proposed to be appropriated for said purposes by said corporation, and whenever by reason of floods or otherwise, the channel of any stream shall be so changed as to put such stream beyond the limits of said original plat, or any supplemental or additional plat filed pursuant to the provisions of this section, such corporation may file in the office of the Secretary of State additional plats or surveys showing the change in said channel and so much of the shore lines of the waters of the state and lands contiguous thereto as are proposed to be appropriated for said purposes by said corporation which shall

vest it with the same rights that it acquired by the filing of said original plat. [Laws 1907, § 2, p. 76; 1 H. C., § 1591; Bal., § 4379.]

Ballinger's Code, section 4379, gives a boom company right to condemn the land selected in its plat of survey. (Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670.)

Riparian rights on navigable river are subject to condemnation by boom company to give public service, and plat showing contiguous land is sufficient to warrant condemnation of such contiguous land. (Burrows v. Gray's Harbor Boom Co., 44 Wash. 630.)

A boom company has the power to select the location designated in the plat. (Samish River Boom Co. v. Union Boom Co., 32 Wash. 586.)

§ 527. Powers of Corporations.

[§ 7112, Rem.–Bal.] Such corporations shall have power and are hereby authorized, in any of the waters of this state, or the dividing waters thereof, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or other structure necessary or convenient for carrying on the business of such corporations: Provided, that such boom or booms, sheer booms or receiving booms shall be so constructed as to allow the free passage between any of such booms and the opposite shore for all boats, vessels or steam crafts of any kind whatsoever, or for ordinary purposes of navigation. [Laws 1890, § 3, p. 471; 1 H. C., § 1592; Bal., § 4380.]

Permanent structures violating riparian rights and obstructing navigation not authorized. (Burrows v. Gray's Harbor Boom Co., 44 Wash. 630.)

§ 528. Duty of—Tolls.

[§ 7113, Rem.–Bal.] After such works shall have been constructed, such corporation shall catch, hold and assort the logs and timber products of all persons requesting such service, upon the same terms and without discrimination; and shall have the right, in consideration of the convenience and security afforded to the public in the handling of logs and timber products, to charge and collect tolls on all logs or other timber products, caught within their works and upon the order or request of the owner or owners thereof, and there assorted, boomed or rafted; said tolls shall not exceed seventy-

five cents per thousand feet on logs, spars or other large timber, and reasonable rates on all other timber products: Provided, that it shall be the duty of any corporation operating a boom at the mouth of any river, to catch and hold, assort, boom and raft all logs and timber products except such as may be already in charge of its owner or his agents, without request of the owner or owners, and shall have the right to charge and collect tolls not to exceed seventy-five cents per thousand feet for such service. The amount of logs or timber is to be board measure, to be ascertained by the usual legal method of scaling; and such corporation shall have a lien upon the logs and timber products for the driving, floating, booming, sorting and rafting thereof, and the right to enforce such liens in any manner provided or that may be provided by law for the enforcement of liens upon personal property. Such corporation shall, as soon as practicable, deliver logs or other timber products caught within their booms, sorted and rafted ready for towing, to the owner or owners thereof, and if required to hold such property for more than thirty days, shall have the right to charge a reasonable rate for such storage for the period of excess. [Laws 1890, § 4, p. 471; 1 H. C., § 1593; Bal., § 4381.]

Written contract not essential to recovery for loss of logs. (Tingley v. Bellingham Bay Co., 5 Wash. 644.)

Tolls must not exceed statutory rates, and must be reasonable. (Cascade Boom Co. v. McNeely Log Co., 37 Wash. 203; Gray's Harbor Boom Co. v. Lytle Log etc. Co., 36 Wash. 151; Washongal etc. Co. v. Skamania Log Co., 23 Wash. 89; Gray's Harbor Boom Co. v. McArmont, 21 Wash. 465.)

§ 529. Assorting and Separating Logs.

[§ 7114, Rem.–Bal.] It shall be the duty of all said boom corporations, in assorting, to separate the logs, lumber or other timber products into separate booms ready for towing, so that logs or other timber products shall go to the mills or place intended for use or storage in one or more booms: Provided, that in case more than one boom is located on or in the same river or its tributaries, the corporation owning the upper boom or works shall pass free of charge all saw-logs or other

timber products consigned to the lower boom or booms. [Laws 1890, § 5, p. 472; 1 H. C., § 1594; Bal., § 4382.]

§ 530. Record of Rafts Assorted.

[§ 7115, Rem.–Bal.] It shall be the duty of every corporation organized and transacting business under the provisions of this act to keep in the office of its secretary, open to public inspection, a book or books in which shall be truly recorded the facts, so far as known, regarding each and every raft by it assorted. Such record shall specify: 1st, names of owners; 2d, marks or brands; 3d, number of logs in each boom; 4th, number of feet in boom; 5th, name of steamer receiving possession; 6th, date of departure from boom. [Laws 1890, § 6, p. 472; 1 H. C., § 1595; Bal., § 4383.]

§ 531. Liability for Damage.

[§ 7116, Rem.–Bal.] Corporations organized in accordance with the provisions of this act shall be liable to the owner or owners of logs or other timber products for all loss or damage resultant from neglect, carelessness or unnecessary delay on the part of servants of such corporations: Provided, that loss caused by fire and ice, which cannot be reasonably guarded against, shall not be construed as resultant upon neglect or carelessness on the part of the corporation. [Laws 1890, § 7, p. 472; 1 H. C., § 1596; Bal., § 4384.]

In action for conversion of logs it is immaterial whether the logs were wrongfully cut up or converted. (Shields v. Doty etc. Co., 48 Wash. 679.)

§ 532. Damages for Neglect.

[§ 7117, Rem.–Bal.] In addition to such damages as are herein provided for any corporation willfully neglecting to assort and deliver such logs and timber products according to the provisions of this act, it shall be liable to a fine not exceeding twenty per centum of the value of such property which it shall have failed to deliver, but no such corporation shall be liable to such damages or penalty if said owner or owners of such logs or timber products shall have failed to furnish the

necessary boom sticks and chains to raft the same. [Laws 1890, § 8, p. 472; 1 H. C., § 1597; Bal., § 4385.]

§ 533. Public Waterways.

[§ 7118, Rem.–Bal.] All meandered rivers, meandered sloughs and navigable waters in this state shall be deemed as public highways, and said corporations shall be declared public corporations for the purpose of this act; and the improvement of such streams, sloughs and waters shall be deemed and declared a public use and benefit. [Laws 1890, § 9, p. 473; 1 H. C., § 1598; Bal., § 4386.]

§ 534. Corporations—Powers of.

[§ 7119, Rem.–Bal.] Any corporation having for its object, in whole or in part, the clearing out and improvement of rivers and streams in this state, and for the purpose of driving, sorting, holding and delivering logs and other timber products thereon, may be organized under the laws of this state, and in accordance with the provisions of the codes and statutes of Washington, as set down and numbered in volume 1 of Hill's Annotated Statutes and Codes of Washington, sections 1497 to 1520, inclusive, and such corporations shall have all powers and be subject to all the liabilities and duties therein mentioned. [Laws 1895, § 1, p. 128; Bal., § 4387.]

1 H. C., §§ 1497–1520=Ch. 1, Tit. 25, Rem.–Bal.

The right to form boom company is a franchise, though not exclusive. (Chehalis Boom Co. v. Chehalis County, 24 Wash. 135.)

State not necessary party to condemnation by boom company of tide lands. (North River Boom Co. v. Smith, 15 Wash. 138.)

Allegation of contract for driving logs admission of its ratification. (Tingley v. Bellingham Bay Boom Co., 5 Wash. 644.)

§ 535. Authority and Power of Eminent Domain.

[§ 7120, Rem.–Bal.] Such corporation shall have power to acquire, hold, use and transfer all such real and personal property or estate, by lease or purchase, as shall be necessary for carrying on the business of said corporation. If such corporation shall not be able to agree with persons owning land, shore rights or other property sought to be appro-

priated, as to the amount of compensation to be paid therefor, the compensation therefor may be assessed and determined and the appropriation thereof be made in the manner provided by law for the appropriation of private property in chapter 6 of title 9, volume 2, Hill's Annotated Statutes and Codes of Washington: Provided, that any property acquired under the provisions of this act for the purposes herein mentioned by the exercise of the right of eminent domain shall be used exclusively for the purpose aforesaid; and whenever the use of said property acquired by the right of eminent domain, as herein contemplated, shall cease for a period of one year, the same shall revert to the original owner, his heirs or assigns. [Laws 1895, § 2, p. 129; Bal., § 4388.]

Ch. 6, Tit. 9, 2 H. C. = Ch. 5, Tit. 6, § 921 et seq., Rem.–Bal.

Use of banks of stream by boom company for artificial freshets is public use. (State ex rel. Wilson v. Superior Court, 47 Wash. 397, 92 Pac. 269; State ex rel. Pealer v. Superior Court, 58 Wash. 565, 109 Pac. 340.)

A riparian owner may enjoin log-driving company from retarding natural flow of stream. (Kalama etc. Co. v. Kalama Driving Co., 48 Wash. 612.)

§ 536. Plats, When Filed.

[§ 7121, Rem.–Bal.] Any corporation organized for the purposes mentioned in section one of this act [7119, Rem.–Bal.] shall, within ninety days after its articles of incorporation shall have been filed, proceed to file in the office of the Secretary of State a plat or survey of so much of the shore lines of the waters of the state or of any of the rivers or streams thereof and lands contiguous thereto as are proposed to be appropriated for such purposes by said corporation. Such plat shall be made from the records of the United States in the office of the surveyor general of this state, or by a competent surveyor, after actual survey, from the notes thereof, and whenever such appropriation is made upon unsurveyed lands, then by an actual survey made by a competent surveyor. Such corporation may from time to time, whenever it desires to extend its operations to portions of streams not embraced in its original plat, or to other streams tributary to the stream or streams described in

such original plat, or any portion of such streams, file additional plats in the office of the Secretary of State, and whenever by reason of floods or otherwise, the channel of any stream shall be so changed as to put such streams beyond the limits of said original plat, or any supplemental or additional plat filed pursuant to the provisions of this section, such corporation may file in the office of the Secretary of State supplemental plats showing the change in said channel which shall vest it with the same rights that it acquired by the filing of said original plat. [Laws 1905, § 1, p. 232; Bal., § 4389.]

The purpose of the plat is that of notice, and a company may in proper case condemn lands outside the plat. (State ex rel. Gray's Harbor Co. v. Superior Court, 57 Wash. 71, 106 Pac. 481.)

§ 537. General Powers and Duties.

[§ 7122, Rem.–Bal.] Such corporation shall have power and is hereby authorized in any of the rivers and streams of this state, or the dividing waters thereof, to remove jams, roots, snags and rocks, improve and straighten the channel, build wing dams and sheer booms, construct dams and gates, or otherwise, for the purpose of storing water with which to produce artificial freshets and for the purpose of holding logs and other timber products and in all ways to improve such streams and rivers for the purposes herein mentioned and contemplated: Provided, that no such wing dam, sheer boom, dam with gate or otherwise, shall be so constructed, maintained or used as to in any manner obstruct or impede the outlet of such stream: And provided further, that if any such wing dam, sheer boom, dam with gate or otherwise shall be so constructed, maintained or used as to interfere with the use for any purpose of the waters of any stream or dammed or used, or any of its tributaries, or in any manner to injure or damage any lands adjacent to such stream or its tributaries, compensation for such interference with the use of such water and for any such injury or damage shall be first assessed and determined and the appropriation thereof may be made by the exercise of the power of eminent domain in the manner provided in section two of this act: Provided, however, that whenever the owners of more than one-half of the land lying

alongside or abutting on any stream affected by the tide, proposed to be improved according to this act, shall file with the board of county commissioners of the county in which said river is situated a remonstrance against any improvements of so much of the stream as is affected by the tide, it shall then be unlawful for any corporation to take the land or any slough within the territory owned by any such remonstrancers: Provided, that such remonstrance shall be filed with said board within fifteen days from the filing of said plat. Nothing in this act shall be construed to authorize the taking or damaging of any power plant constructed or being constructed for the creation or utilization of water-power. [Laws 1905, § 1, c. 57, p. 108; Bal., § 4390.]

§ 2= § 7120, Rem.-Bal.

Section construed to give by necessary implication right to obstruct restricted navigation on small streams. (State ex rel. Pealer v. Superior Court, 58 Wash. 565, 109 Pac. 340.)

§ 538. Driving Logs—Tolls—Booming and Rafting—Liens. [§ 7123, Rem.-Bal.] After such corporation shall have entered upon its duties, which shall be within three months of the filing of its maps of location, such corporation shall come in streams theretofore navigable, upon the request of the owners, and in case of logs and other timber products being commingled, or lying in such a position as to obstruct or impede the drive, without such request: Provided, that when a navigable stream upon which it was not previously practicable to float logs or other timber products is improved by clearing out rocks, straightening the channel, or the construction of wing dams and sheers by the corporation having a charter thereon, and thereby aiding and assisting the floating of logs and other timber products, a corporation shall be entitled to driving charges on all such logs or other timber products placed in said stream without request to drive the same, and in streams not navigable before such improvements were made, without request, sluice, sack and drive all logs and other timber products of suitable length that may be placed in the beds of the stream improved as aforesaid, or that may be

delivered into its ponds, and shall handle all such logs and other timber products of all persons upon the same terms, without discrimination as to time of sluicing, sacking and driving such logs, or other timber products, and shall be entitled to charge and collect reasonable and uniform tolls for such services and improvements, on all logs and other timber products so handled, or sheered out of sloughs or off bars by means of such improvements; such tolls shall not exceed one dollar per thousand feet, board measure, on logs, spars, or other large timber, and reasonable compensation on all other timber products, for the use of such improvements, and for sluicing, sacking and driving the same, such charges to be fixed by the board of trustees of such corporation in proportion to the distance such timber is to be driven and the number of dams through which the same is necessarily sluiced or sheered, and in case any such corporation shall be engaged in the booming and rafting of logs and other timber so sluiced, sacked and driven, an additional sum not to exceed sixty cents per thousand feet for logs, spars and other large timber, and reasonable compensation on all other timber products may be charged for booming and rafting the same; the amount of such logs and other products is to be determined by the usual method of scaling, and such corporation shall have a lien upon all logs and other timber products handled for sluicing, sacking and driving, and for booming and rafting the same, to be enforced in any manner now or hereafter provided by law for the enforcement of liens for labor on logs. [Laws 1909, § 1, p. 816; Bal., § 4391.]

This section is constitutional. (East Hoquiam Boom etc. Co. v. Neeson, 20 Wash. 142.)

Boom companies for public service are public corporations. (North River Boom Co. v. Smith, 15 Wash. 138.)

§ 539. Damages for Neglect.

[§ 7124, Rem.–Bal.] Any corporation acting under and in accordance with the provisions of this act shall be liable to the owner or owners of logs or other timber products for all loss or damage resulting from neglect, carelessness or unnecessary

delay on the part of such corporation or its agents. [Laws 1895, § 6, p. 131; Bal., § 4392.]

§ 540. Rights to Cease, When.

[§ 7125, Rem.–Bal.] Should any corporation neglect, for the period of eight months after improving any stream or river, to operate its dams, or to otherwise perform its duties as herein provided, then all rights herein conferred to such corporations upon such streams or rivers, or portions thereof, shall cease. [Laws 1895, § 7, p. 131; Bal., § 4393.]

Mere lack of business not necessarily nonuser. (State ex rel. Wilson v. Superior Court, 47 Wash. 397.)

§ 541. Boom Companies, Rights of.

[§ 7126, Rem.–Bal.] Duly organized boom companies at present operating upon any of the streams or rivers of this state may file amended articles of incorporation to embrace the provisions of this act, and for the purpose of time limitations mentioned in this act, the time of filing such amended articles of incorporation shall be deemed to be the time of organization thereof, but failure to comply with the provisions of this act shall work forfeiture of the rights of such corporations only so far as the same are subjoined under the provisions of this paragraph. [Laws 1895, § 8, p. 131; Bal., § 4394.]

TOLL-LOGGING ROADS AND WAYS.

§ 542. Articles of Incorporation.

[§ 7106, Rem.–Bal.] Any two or more persons may incorporate a company, having for its principal object the construction, maintenance and operation of logging roads, chutes, flumes and artificial watercourses, or waterways and other ways, for the transportation of logs and other timber products. Such corporation shall have power to acquire, hold, use and transfer all such real and personal property as shall be reasonably necessary for carrying on the business of such corporation. [Laws 1905, § 1, p. 161, c. 82.]

"Person" construed to be individual as distinct from corporation. (Denny Hotel Co. v. Schram, 6 Wash. 134.)

Company may make its own selection for toll-logging road. (State ex rel. Clark v. Superior Court, 62 Wash. 612, 114 Pac. 444.)

§ 543. Power of Corporation.

[§ 7107, Rem.–Bal.] Such corporation shall have power to build, construct, maintain and operate logging roads, whether skid roads, railroads or any other kind, also chutes, flumes and artificial watercourses, waterways and other ways, for the transportation of logs or any other timber products, together with all necessary yarding grounds, rollways and landings. [Laws 1905, § 2, p. 161, c. 82.]

§ 544. To Transport Lumber, Logs, etc.—Lien for Services.

[§ 7108, Rem.–Bal.] After any such logging road, way, chute, flume, or artificial watercourse or other improvements shall have been constructed, such company shall transport all timber products offered to it for carriage as its means of transportation are adapted to carry, and such company shall have the right to charge reasonable tolls for the use thereof, which tolls shall be uniform, having due regard to the portion or length of any such logging road, way, chute, flume, or artificial watercourse or other improvements used by any person. Such company shall have a lien for the amount of its reasonable tolls

and charges upon any and all logs or other timber products transported by it over its logging road, way, chute, flume or artificial watercourse. Notice of such lien shall be filed, and the same shall be enforced, in the same manner as is now or may hereafter be provided for the filing and enforcement of liens on logs by boom companies. [Laws 1905, § 3, p. 162, c. 82.]

§ 545. Deemed Common Carriers—Right of Eminent Domain.

[§ 7109, Rem.–Bal.] Such companies shall be deemed quasi-public companies and common carriers, and any such company shall have the right of eminent domain and shall have the right to appropriate and condemn lands and property for its use. Such right of condemnation and of eminent domain shall be exercised in the same manner as is now, or may hereafter be, provided by law for the condemnation of property by ordinary railroad corporations exercising the right of eminent domain: Provided, that the right of eminent domain shall not be exercised by any such corporation with respect to any residence: And provided further, that any property acquired by such corporation under the provisions of this act by the exercise of the right of eminent domain shall be used exclusively for the purposes of this act; and whenever the use of such property as herein contemplated shall cease for the period of one year, the property shall revert to the original owner, his heirs or assigns. Nothing in this act shall be construed to authorize the taking or damaging of any power plant constructed or being constructed for the creation or utilization of water power. [Laws 1905, § 4, p. 162, c. 82.]

A company may condemn land in accordance with its special charter or subsequent general law. (Cascades R. Co. v. Sohms, 1 Wash. Ter. 557.)

Right of way for logging roads and lumbering purposes not public use. (Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681; Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 Pac. 1046.)

Toll-logging road as public carrier is public use. (State ex rel. Clark v. Superior Court, 62 Wash. 612, 114 Pac. 444.)

CO-OPERATIVE ASSOCIATIONS.

§ 546. Co-operative Associations—Who may Organize—Purposes.

Any number of persons, not less than five, may associate themselves together as a co-operative association, society, company or exchange for the transaction of any lawful business on the co-operative plan. For the purposes of this act the words "association," "company," "exchange," "society" or "union" shall be construed the same. [Laws 1913, c. 19, § 1.]

The essential characteristic of a co-operative association is that it has for its object the sharing of profits with laborers and wage-earners as such as well as among investors and stockholders. (Finnegan v. Noerenberg, 52 Minn. 238, 244, 53 N. W. 1150.)

Co-operative associations are similar to joint stock companies. (Chater v. San Francisco S. R. Co., 19 Cal. 219, 246.)

Personal liability of stockholder may be waived or limited by agreement. (Robinson v. Bidwell, 22 Cal. 379, 388.)

Co-operative associations incorporated under statute are governed by the same rules applicable to voluntary co-operative associations except so far as modified by statute. (Atwood v. Dumas, 149 Mass. 167, 21 N. E. 236; McCallian v. Hibernia Sav. & Loan Soc., 70 Cal. 163, 12 Pac. 114; Mokelumne Hill C. & Min. Co. v. Woodbury, 14 Cal. 424; Bank v. Bean, 124 Mass. 81; Merrill v. McIntire, 13 Gray (Mass.), 157; Baxter v. McIntire, 13 Gray (Mass.), 168.)

§ 546a. Articles—Contents.

Every association formed under this act shall prepare articles of association in writing, which shall set forth:

1. The name of the association.
2. The purpose for which it was formed.
3. Its principal place of business.
4. The term for which it is to exist which shall not exceed fifty years.
5. The amount of capital stock, the number of shares and the par value of each share. [Laws 1913, c. 19, § 2.]

§ 546b. Articles—Verification—Filing—When Legally Organized.

The original articles of associations organized under this act or a true copy thereof verified to be such by the affidavits of two of the signers thereof, shall be filed with the Secretary of State. Whenever a certified copy of the same accompanied by a certificate of the Secretary of State showing that the same has been filed in his office, is filed with the county auditor of the county in which is located the principal place of business of said association, the said association shall be deemed to be legally organized. [Laws 1913, c. 19, § 3.]

§ 546c. Filing Fees.

For filing articles of association organized under this act there shall be paid to the Secretary of State the sum of twenty-five dollars and for the filing of an amendment of such articles there shall be paid the sum of ten dollars. For recording such articles of association or an amendment thereto, the county auditor shall charge the sum of fifteen cents for each one hundred words thereof, and fifteen cents for filing and indexing the same. [Laws 1913, c. 19, § 4.]

§ 546d. Trustees—Election—Duties—Election of Officers.

Every such association shall be managed by a board of not less than three trustees. The trustees shall be elected by and from the stockholders of the association at such time and for such term of office as the by-laws may prescribe, and shall hold office during the term for which they were elected and until their successors are elected and qualified; but a majority of the stockholders shall have the power at any regular or special meeting, legally called for that purpose to remove any trustee or officer for cause, and fill the vacancy. The officers of every such association shall be a president, one or more vice-presidents, a secretary and a treasurer who shall be elected annually by the trustees. Each of said officers must be a member of the association. All elections shall be by ballot. [Laws 1913, c. 19, § 5.]

§ 546e. Amendments—How Adopted—Recording.

The articles of association may be amended by a majority vote of the stockholders at any regular stockholders' meeting or at any special stockholders' meeting called for that purpose, on twenty days' written notice being given to the stockholders. Said power to amend shall include the power to increase or diminish the amount of capital stock and the number of shares: Provided, the amount of the capital stock shall not be diminished below the amount of the paid-up capital stock at the time such amendment is adopted. Within thirty days after the adoption of an amendment to its articles of association, the association shall cause a copy of such amendment adopted to be recorded in the office of the Secretary of State and of the county auditor of the county where its principal place of business is located. [Laws 1913, c. 19, § 6.]

§ 546f. Business Authorized to be Conducted — Lawful Business Defined.

An association created under this act, being for mutual welfare, the words "lawful business" shall extend to every kind of lawful effort for business, agricultural, dairy, mercantile, mining, manufacturing or mechanical business, on the co-operative plan. [Laws 1913, c. 19, § 7.]

§ 546g. Stock—Issue—Limit—Vote.

No stockholder in any such association shall own more than one-fifth of the stock of the association, except as hereinafter provided. No stockholder at any meeting shall be entitled to more than one vote. [Laws 1913, c. 19, § 8.]

§ 546h. Subscription of Stock in Other Associations.

At any regular meeting or any regularly called special meeting at which at least a majority of all the stockholders shall be present, or represented, an association organized under this act may by a majority vote of the stockholders present or represented, subscribe for shares and invest its reserve fund or any part thereof in the capital stock of any other co-operative association. [Laws 1913, c. 19, § 9.]

§ 546i. Purchasing Business of Other Associations—Payment—Stock Issued.

Whenever an association organized under this act shall purchase any stock of another association or the interest or any part thereof of any person or persons, firm or partnership engaged in any lawful business as defined in section 7 [§ 546, ante] of this act, it may pay for the same in whole or in part by issuing to the selling association or person, firm or partnership, shares of its capital stock to an amount which at par value, would equal the fair market value of the stock or interest so purchased and in such case the transfer to the association of such stock or interest so purchased at such valuation shall be equivalent to payment in cash for the shares of stock so issued. [Laws 1913, c. 19, § 10.]

§ 546j. Certificates of Stock—When Held in Trust—Issued.

In case the cash value of such stock or interest so purchased exceeds one-fifth of the par value of the purchasing association, the trustees of the purchasing association are authorized to hold the shares in excess of one-fifth of the par value of the purchasing association, in trust for the vendor and dispose of the same to such person or persons and within such time as may be mutually agreed upon by the parties in interest, and shall pay the proceeds thereof as currently received to the former owners thereof. Certificates of stock shall not be issued to any subscriber until fully paid for, but the by-laws of the association may allow subscribers to stock to vote as stockholders: Provided, that one-fifth of the stock subscribed for has been paid for by such subscriber. [Laws 1913, c. 19, § 11.]

§ 546k. Stockholders may Vote by Mail.

At any regular, called, general or special meeting of the stockholders, a written vote received by mail from any absent stockholder and signed by him may be read in such meeting and shall be equivalent to a vote of each of the stockholders so signing: Provided, he has been previously notified in writing of the exact motion or resolution upon which such vote

is taken and a copy of same is forwarded with and attached to the vote so mailed by him. [Laws 1913, c. 19, § 12.]

§ 546l. Earnings—Apportionment.

The trustees shall apportion the net earnings by first paying dividends on the paid up capital stock at a rate not exceeding eight per cent per annum; then setting aside not less than ten per cent nor more than twenty-five per cent of the remainder annually of the net profits for a reserve fund and the remainder of said net profits by dividends proportioned upon the amount of business transacted with said association and proportioned upon the wages and salaries of employees: Provided, That nonshareholders shall only be entitled to one-half as much dividends from said net profits as shareholders: And provided further, That no dividend shall be paid out or declared on any business transacted with the association by any person, persons, firm or corporation engaged in the buying, selling or handling of agricultural products for profit or to any sale to said association by any person or persons, firm or corporation engaged as a wholesaler or jobber in the distribution of manufactured products. Dividends remaining uncalled for six months after the same have been declared shall revert to the association. [Laws 1913, c. 19, § 13.]

§ 546m. Distribution of Dividends.

The profits or net earnings of such association shall be distributed to those entitled thereto at such time and in such manner not inconsistent with this act as its by-laws shall prescribe, which shall be as often as once a year. [Laws 1913, c. 19, § 14.]

§ 546n. Annual Reports—Contents—Filing.

Every association organized under the terms of this act shall, annually on or before the 1st day of March of each year, make a report to the secretary of state; such report shall contain the name of the company, its principal place of business in this state and a general statement as to its business, showing the total amount of business transacted, the amount of

capital stock subscribed for and paid in, the number of stockholders, the total expenses of operation, the amount of its indebtedness or liability and its profits and losses. [Laws 1913, c. 19, § 15.]

§ 546o. Co-operative Associations Heretofore Organized—May Adopt Provisions of This Act.

All co-operative associations heretofore organized and doing business under prior statutes, or which have attempted to so organize and do business shall have the benefit of all the provisions of this act and be bound thereby on filing with the Secretary of State signed and sworn to by the president and secretary, manager or other officer managing said business, to the effect that said co-operative company or association has by a majority vote of its stockholders decided to accept the benefits of and to be bound by the provisions of this act. No association organized under this act shall be required to do or perform anything not specifically required herein in order to become an association or to continue its business as such. [Laws 1913, c. 19, § 16.]

§ 546p. Use of Term "Co-operative" Limited to Associations Under This Act.

No corporation or association organized or doing business for profit in this state shall be entitled to use the term "co-operative" as a part of its corporate or other business name or title, unless it has complied with the provisions of this act; and any corporation or association violating the provisions of this section may be enjoined from doing business under such name at the instance of any stockholder or any association legally organized hereunder. [Laws 1913, c. 19, § 17.]

§ 546q. When to Do Business—Liability.

No co-operative association organized under the provisions of this act shall be permitted to do business until three-fourths of the capital stock shall have been subscribed for and one-fourth of the capital stock of said association shall have been paid in to said association. The liability of each stockholder shall be limited to the amount remaining unpaid on his sub-

scription to the capital stock of said association. [Laws 1913, c. 19, § 18.]

§ 546r. May Pass By-laws.

Any association formed under this act may pass by-laws to govern itself in the carrying out of the provisions of this act which are not inconsistent with the provisions of this act. [Laws 1913, c. 19, § 19.]

§ 546t. Constitutionality.

If any section or part of a section of this act shall for any cause be held unconstitutional such fact shall not affect the remainder of this act. [Laws 1913, c. 19, § 20.]

PATRONS OF HUSBANDRY.

§ 547. Manner of Incorporating a Grange.

[§ 3765, Rem.–Bal.] Any grange of the Patrons of Husbandry, desiring hereafter to incorporate, may incorporate and become a body politic in this state by filing in the office of the Secretary of State, and in the office of the county auditor of the county wherein such grange holds its meetings of business, a certificate or articles embodying:

1. The name of such grange and the place of holding its meetings.

2. What elective officers the said grange will have, when such officers shall be elected; how and by whom the business of the grange shall be conducted and managed, and what officers shall join in the execution of any contract of such grange to give force and effect in accordance with the usages of the order of the Patrons of Husbandry. Such articles shall be subscribed by the master of such grange, attested by the secretary with the seal of the grange:

3. A copy of the by-laws of such grange shall also be filed in the said office of the Secretary of State and the county auditor of the proper county;

4. The names of all such officers at the time of filing the application, and the time for which they may be respectively elected. When such articles shall have been filed, such grange shall be a body politic and corporate, with all the incidents of a corporation, subject, nevertheless, to the laws now in force or hereafter to be passed regulating corporations. [Laws 1875, § 1, p. 97; 1 H. C., § 1643; Bal., § 4460.]

§ 548. Pursuits Such Corporation may Engage in.

[§ 3766, Rem.–Bal.] Said grange may engage in any industrial pursuit, manufacturing, mining, milling, wharfing, docking, commercial, mechanical, mercantile, building, farming, equipping or running railroads or generally engage in any species of trade or industry; loan money on security, purchase and sell on real estate; but when desiring to engage in

either or any of the above pursuits, or industries, said grange shall be subject to all the conditions, and liabilities imposed by the provisions of the general corporation laws, and in addition to the conditions to be performed as recited in the last preceding section, shall file additional articles with said Secretary of State, and the county auditor of the proper county, stating the object, business, or industry proposed to be pursued or engaged in, the amount of capital stock, the time of its existence, not to exceed fifty years; the number of shares of which the capital stock shall consist, and price per share, and the names of officers necessary to manage said business and the places where said officers shall pursue the same. [Laws 1875, § 2, p. 97; 1 H. C., § 1644; Bal., § 4461.]

§ 549. General Rights and Liabilities.

[§ 3766a, Rem.–Bal.] As a business corporation, said grange, after having complied with the provisions of the last preceding section, shall be to all intents and purposes a domestic corporation, with all the rights, privileges, and immunities allowed, and all the liabilities imposed, by the laws of the state relating to corporations engaged in the same kinds of business. [Laws 1875, § 3, p. 98; 1 H. C., § 1645; Bal., § 4462.]

BUILDING, LOAN AND SAVINGS ASSOCIATIONS.

An Act relating to the organization and to the management, regulation and control of building and loan and savings and loan associations and societies; providing penalties for the violation thereof; and repealing sections 3601 to 3638 inclusive of Remington and Ballinger's Annotated Codes and Statutes of Washington. [Laws 1913, c. 110.]

§ 550. Formation of.

Ten or more persons, citizens of the state of Washington, may form a savings and loan association or savings and loan society for the purpose of accumulating the savings and funds of its members and lending its shareholder or others the funds so accumulated by making and acknowledging in quadruplicate and by filing as hereinafter required articles of incorporation specifying:

(a) The name of the proposed association, which shall terminate with the words "Savings and Loan Association," or "Savings and Loan Society."

(b) The city, town or village and the county wherein the principal place of business of the association is to be located and which must be within the state of Washington.

(c) The number of its directors, which shall not be less than seven nor more than fifteen. The first board of directors shall hold office for a term to be specified in said articles of not less than two, and not more than six months from the time said association is authorized to do business.

(d) The names, occupation and postoffice addresses of its first directors.

(e) The names, occupation and postoffice addresses of the subscribers to the articles of incorporation, and a statement of the number of shares which each has agreed to take. The matured value of the total number of shares so subscribed shall be at least $25,000.00.

(f) The limit of capital to be accumulated.

(g) The time of duration of said association, which shall not exceed fifty years.

Said articles shall be filed in the first instance in the office of the state auditor pending his approval thereof and of the by-laws of said association as hereinafter provided for.

The articles of incorporation may be amended by a vote of at least two-thirds in number of the shareholders voting at any general meeting, or by a special meeting called for that purpose, and a copy of the resolutions making said amendment shall be certified in quadruplicate by the president and secretary under the seal of said corporation, and when so certified shall be so filed and kept the same as in the case of original articles, and from the time of said filing, said amendment shall have the same effect as if embraced in the original articles of incorporation: Provided, however, that no increase in the authorized capital shall be made unless three-fourths of the capital previously authorized has actually been issued. [Laws 1913, c. 110, § 1. Cf. § 3601, Rem.–Bal.]

"Person" construed to be individual as distinct from corporation. (Denny Hotel v. Schram, 6 Wash. 134, 32 Pac. 1002.)

Loans made contrary to by-laws held ratified. (Blair v. Metropolitan Savings Bank, 27 Wash. 192, 67 Pac. 609.)

Mortgages deposited with state auditor are trust fund for stockholders and cannot be sold to third parties. (Trowbridge v. Hamilton, 18 Wash. 686, 52 Pac. 328; Hale v. Stenger, 22 Wash. 516, 61 Pac. 156.)

Contracts by foreign association not having complied with statutory requirements not void. (Horrell v. Homebuilders' Assn., 40 Wash. 531, 82 Pac. 889.)

The relation of stockholder to building and loan association is that of borrower, and he is entitled to have all payments, whether premiums, dues, fines or other, credited on his loan. (Hale v. Stenger, 22 Wash. 516, 699, 61 Pac. 156, 63 Pac. 554; United States S. & L. Co. v. Owens, 23 Wash. 790, 63 Pac. 1134; Hopkins v. Hale, 23 Wash. 790, 63 Pac. 1134; Interstate S. & L. Assn. v. Cairns, 16 Wash. 215, 47 Pac. 509; United States S. & L. Assn. v. Parr, 26 Wash. 115, 66 Pac. 109.)

Where a note and mortgage contain a provision for declaring the entire amount due on failure to pay installment of interest, default is not fixed until the company elects to so declare. (United States S. & L. Co. v. Cade, 15 Wash. 38, 45 Pac. 656.)

In computing amount due from a member, the note, mortgage and contract of membership constitute one transaction. (Interstate S. & L. Assn. v. Knapp, 20 Wash. 225, 55 Pac. 48, 931.)

§ 551. By-laws—Approval.

Each association shall adopt by-laws for its government and therein describe the manner in which its business shall be transacted, which by-laws shall be in conformity with the provisions of this act, and the laws of this state, and at all times be open to the inspection of the state auditor and the members of the association at its home office. All by-laws shall be subject to the approval of the state auditor before going into effect, and in case any provision in such by-laws shall be contrary to the provisions of this act, or to the laws of this state, or be detrimental to the interests of the members of such organization, or against public policy, he may, under the advice and consent of the attorney general, require the same to be stricken out. [Laws 1913, c. 110, § 2. Cf. § 3603, Rem.–Bal.]

§ 552. Approval by State Auditor of By-laws, etc.

Whenever said articles of incorporation are in due form and regularly executed and the by-laws have been duly approved as above required, the state auditor thereupon shall ascertain from the best source of information at his command the responsibility, character and general fitness of the incorporators. If he shall be satisfied concerning the several matters specified above, he shall, within a reasonable time, issue under his hand and official seal a certificate reciting in substance the filing in his office of the articles of incorporation and by-laws; that said articles and by-laws conform to all the requirements of law; that he has approved the same, and that he verily believes the incorporators are fit and proper to conduct the business of a savings and loan association as defined in this act and said by-laws. Said certificate shall be made in quadruplicate and attached to each copy of the articles of incorporation, one of which shall be retained by the state auditor and the other three shall be returned to the incorporators who shall forthwith file one copy thereof in the office of the Secretary of State, one in the office of the auditor of the county in which the chief place of business of said association is located, and the other shall be retained by the asso-

ciation, whereupon the incorporation of said association shall be deemed complete. [Laws 1913, c. 110, § 3.]

§ 553. Oath and Bond of Officers and Directors.

Each officer and director, when appointed or elected, shall take an oath that he will, so far as the duty devolves upon him, diligently and honestly administer the affairs of such association, and will not knowingly violate the by-laws or any of the provisions of law applicable to such association.

Each officer or agent having the custody of money or securities of an association shall be required to give bond to such association in an amount to be determined by the board of directors of such association commensurate with his liability. [Laws 1913, c. 110, § 4.]

§ 554. Membership.

The membership of the association shall consist of those persons holding shares therein.

The by-laws may provide for an entrance, membership or withdrawal fee, but the total of such fees shall not exceed two dollars upon each share, and no other fee, penalties, fines or forfeitures shall be charged, except reasonable charges for expenses in closing loans, and for delinquency in making payment on stock and loans.

The above provision shall not apply to dividends which may revert to the association as provided in section 7 of this act. [Laws 1913, c. 110, § 5.]

§ 555. Capital Stock—Classified Shares.

The capital of every such association shall consist of the accumulated payments made by its members and dividends credited thereon, and shall be represented by shares. Every share issued shall have a matured value of one hundred dollars. Every such association shall be either permanent or serial in character as provided by the terms of its by-laws. A permanent association may issue shares at any time and credit its dividends upon the passbooks of its members. A serial association may issue shares in series and credit its dividends equally upon each share issued in such series. No

shares of a prior series shall be issued after the issuing of shares in a later series, when issued upon the serial plan, except at the book value at the last distribution of profits plus the dues and accumulated earnings thereon since such distribution. Shares which have not been transferred to the association as security for the repayment of a loan shall be called free shares. Shares that have been so transferred shall be called pledged shares.

No preferred stock shall be issued, i. e., stock upon which a different or stipulated rate of dividends shall be guaranteed or paid before or regardless of the amount of dividends distributed to other classes of shares, neither shall any shares be issued which shall be exempt from bearing their pro rata portion of loss: Provided, however, that nothing herein contained shall be held to prohibit any association already having reserve stock outstanding from continuing to have an equal amount of such stock outstanding, and from issuing, if necessary, additional reserve fund stock so as to equal five per cent of the capital as defined in this section; and when so provided in its by-laws, such reserve fund stock may participate in all earnings equitably with the general stock and be chargeable with all real estate taken under foreclosure or otherwise in the adjustment of delinquent loans together with all direct losses of whatever nature sustained by the association in the general course of business and in consideration of such guaranty against loss, and when provided in the by-laws such stock may receive additional dividends, and such stock shall not be subject to withdrawal until all other classes of stock and all other liabilities of the association shall first have been liquidated, and any such association may agree to mature its other classes of stock at a fixed time, providing any deficiency arising therefrom shall be chargeable only to such reserve fund stock.

Any association may issue the shares classified below when so provided by its by-laws:

(a) Installment shares upon which a regular stipulated payment of dues shall be made at stated periods expressed in the by-laws.

(b) Savings shares, upon which payments shall be made in such sums and at such times as the holder thereof may elect until the shares reach their matured value or are withdrawn.

(c) Fully paid shares, upon which a single payment amounting to one hundred dollars per share shall be paid at the time of subscription.

(d) Juvenile shares. Any association may issue juvenile shares to, or in the name of, any minor which shall be held for the exclusive right and benefit of such minor and free from the control or lien of all other persons; and the accumulated savings on these shares together with the dividends credited thereon shall be paid to the persons in whose name the shares have been issued and the receipt or acquittance of such minor shall be valid and sufficient release and discharge to the association for such accumulated savings, together with the dividends credited thereon or any party thereof. [Laws 1913, c. 110, § 6. Cf. § 3626, Rem.–Bal.]

§ 556. Dividends.

Profits and losses shall be ascertained and distributed semi-annually or annually. Dividends shall be taken from the net earnings of the association and, subject to the provisions of section 6 [§ 555, ante] relating to reserve fund stock shall be distributed ratably to all classes of shares and to each share in proportion to the accumulation made thereon: Provided, that when stock is withdrawn within two years of its issuance, the withdrawing member shall receive only such proportion of the dividends as may be provided in the by-laws, but when such stock is more than two years old, the withdrawing member shall receive at least seventy-five per cent of the dividends. The remaining dividends may revert to the undivided earnings. No dividends shall be credited or paid except by a vote of the board of directors duly entered upon the minutes, whereupon shall be recorded the vote by ayes and nays. It shall be lawful for the association, in addition to the contingent fund required by section 13 [§ 562, post] of this act, to hold in its fund of undivided earnings, such sum as the board of directors may from time to time deem necessary or wise; Provided, however, that when the undivided earnings, including the contingent

fund, exceed fifteen per cent of the dues and dividends credited to members, the board of directors shall declare such extra dividend in excess of the dividend regularly apportioned, as may be necessary to distribute among the shareholders the accumulation in excess of such authorized surplus. [Laws 1913, c. 110, § 7. Cf. § 3627, Rem.-Bal.]

As to withdrawal value in cases of fraud, see Conaway v. Co-operative Home Builders, 65 Wash. 39, 117 Pac. 716.

§ 557. Security for Loans—Bonds.

For every loan made, except a loan from one association to another, a note or bond secured by first mortgage on improved real estate shall be taken, which security shall be conservatively worth at least twice the value of the loan. No mortgage loan shall be made except upon the report in writing of an appraiser or a committee of appraisers appointed by the board of directors, which report shall state the conservative value of the mortgage security. The directors in their discretion may also loan upon the security of the shares in the association to the amount of ninety per cent of their withdrawal value, and may loan upon or invest in bonds of the United States and of the state of Washington, and in such classes of bonds and warrants of the counties, school districts and other municipalities, as well as local improvement districts, in this state, as the state auditor may from time to time approve. Any association having a surplus for which there is no demand for loaning purposes or for the payment of withdrawals or matured shares, may loan the same to another domestic association, and such association may borrow from other associations or otherwise for loaning purposes or for the payment of withdrawals or matured shares: Provided, that no association shall borrow any amount or amounts which in the aggregate shall exceed twenty-five per cent of the actual value of mortgages on deposit with the state auditor, as shown by the last preceding semi-annual statement of the borrowing associations, as provided in section 9 of this act.

In borrowing said amount or amounts for the purposes specified, any such association may, at its election, borrow the same or any part thereof upon its debenture bonds, maturing

on or before five years after date and bearing interest not exceeding six per cent per annum, interest payable semi-annually. In no case shall any such bonds be issued when there are sufficient funds on hand or receivable in time to meet approved applications for loans or for the payment of maturing stock or withdrawals of stock. Such debenture bonds may be retired by action of the board of directors at any time after one year from date of issue, by the secretary of the association giving notice in writing sixty days or more prior to the next interest date to the recorded holders thereof, and on return of said retired bonds, together with the coupons attached, said holders shall receive their par value. At the expiration of said interest period, the bonds so called shall cease to draw interest. Whenever the state auditor shall deem any indebtedness incurred under the provisions of this section to be detrimental to the interests of the shareholders of any such association, he shall notify such association to reduce its indebtedness to such amount as he shall consider reasonable, giving such association such reasonable time as may be necessary to effect such reduction of indebtedness. [Laws 1913, c. 110, § 8. Cf. § 3604, Rem.–Bal.]

§ 558. Deposit of Securities.

Every savings and loan association heretofore or hereafter incorporated under the laws of this state, and governed by this act, shall deposit and keep with the state auditor, or with a duly chartered trust company of this state, approved by the state auditor, in trust for all its members and creditors, all mortgages and notes secured thereby, received by it in the usual course of business. When deposited with a trust company such company shall certify to the state auditor the possession of such securities, and the same shall not be surrendered without the authority or sanction of the state auditor. All associations except such as confine their business operations wholly to the county in which such associations are incorporated and adjoining counties, not having or owning mortgages to the amount of twenty-five thousand dollars, shall deposit with the state auditor additional securities to make with the securities so owned and deposited a total value of

not less than twenty-five thousand dollars. Such additional securities shall consist of bonds of the United States and of the state of Washington, and such classes of bonds and warrants of the counties, school districts and other municipalities, as well as local improvement districts, in said state, as the state auditor may from time to time approve, and such additional securities may be withdrawn from time to time when mortgage securities of corresponding value shall be deposited, as provided in this act, or when other securities of like character are substituted therefor, and it shall be the duty of the state auditor, from time to time, to examine said associations to ascertain whether all of its securities are deposited, as required by this act: Provided, that all securities heretofore taken in any other state, territory or nation, by any association organized under the laws of this state, and subject to the provisions of this act, and there deposited under the laws of such state, territory or nation, with some officer, authorized to receive the same, shall not be deposited with the auditor of the state of Washington. But in every such case a certificate of such deposit shall be filed with the auditor of this state, and renewed annually, together with a statement verified by the affidavit of some officer of such association, who has knowledge of the facts, showing all of the securities taken by such association, in such other state, territory or nation, at the time of the filing of such certificate; and in case any securities taken in any such state, territory or nation are not deposited there, then the same shall be deposited here, as required by this act.

Every foreign association doing business in this state and governed by this act shall deposit and keep with the auditor of this state, or with a duly chartered trust company of this state, approved by the state auditor, in trust for all its members and creditors in this state, all mortgages heretofore received by it in this state and now in effect, and all mortgages hereafter received by it in the usual course of its business in this state. Such securities shall be kept and dealt with by the state auditor or by such trust company in like manner as the securities deposited by savings and loan associations organized under the laws of this state. Every association

governed by this act shall on or before the 1st day of February and on or before the 1st day of August in each year, file with the state auditor a verified statement of the total amount due to the association from the borrowers, upon the mortgage loans on deposit with the state auditor upon respectively the thirty-first day of December and the thirtieth day of June last preceding. Payments upon stock pledged to the association for a loan, which payments are accumulated for the purpose of meeting the loan at or prior to its maturity, shall be considered as payments upon such loan within the intent of this section. [Laws 1913, c. 110, § 9. Cf. §§ 3606 and 3608, Rem.–Bal.]

Mortgages deposited with the state auditor are a trust fund for stockholders and cannot be sold to third parties. (Trowbridge v. Hamilton, 18 Wash. 686, 52 Pac. 328; Hale v. Stenger, 22 Wash. 516, 61 Pac. 156.)

§ 559. Surrender of Securities by State Auditor.

All interest and dividends which may accrue on securities held by the state auditor or such trust company as provided for herein and all dues, or monthly payments, which may become payable on stock pledged as security for loans, the notes and mortgages for which are deposited in accordance with the provisions of this act, may be collected and retained by the association depositing such securities or mortgages, so long as such association remains solvent and faithfully performs all contracts with its members, and when any mortgage shall have been fully paid to said association the same shall be surrendered by said state auditor, or under his order, upon filing with him a certificate of the auditor of the county where the real estate is situated, to the effect that the satisfaction of said mortgage has been filed for record. Any mortgage upon which default has been made may be surrendered as aforesaid, upon filing with the state auditor an affidavit sworn to by the president and secretary of the association owning the same, stating that such mortgage is in default and that it is withdrawn for the purpose of foreclosure. [Laws 1913, c. 110, § 10. Cf. § 3607, Rem.–Bal.]

§ 560. Power to Hold Realty.

Any savings and loan association may purchase at any sale, public or private, any real estate upon which it may have a

mortgage, judgment, lien, or other encumbrance or in which it may have any interest, and may sell, convey, lease or mortgage the same at pleasure to any person or persons, but shall not otherwise acquire or deal in real estate: Provided, that any such association may acquire such real estate or a leasehold interest therein as may be necessary or convenient for a location for the transaction of its business: Provided further, that no such association shall use more than ten per cent of its assets at any time in acquiring real estate for its business location: Provided further, that all real estate except that used for its business location shall be sold by said association within five years from and after the time that title thereto is acquired. [Laws 1913, c. 110, § 11. Cf. § 3605, Rem.–Bal.]

§ 561. Checking Accounts Prohibited.

No savings and loan association shall carry any demand, commercial or checking account and no such association shall receive any savings account or any sum of money on deposit without issuing shares of stock for the same. [Laws 1913, c. 110, § 12.]

§ 562. Contingent Fund.

At each periodical distribution of profits, unless such association already has issued paid-up reserve fund stock equal to five per cent of the amount credited to members to which losses may be chargeable as provided in section 6 [§ 555, ante] of this act, the board of directors shall reserve and carry to a contingent fund, a sum equal to at least five per cent of the net earnings during the period since the last previous dividend was declared, until such contingent fund shall be equal to at least five per cent of the amount credited to members. The directors may at any time carry to such contingent fund any further portion of the undivided earnings that in their discretion may seem wise, except as herein provided. Losses of the association may be paid therefrom, and whenever the contingent fund is reduced below five per cent the board of directors shall at each periodical distribution of profits carry to such contingent fund at least five per cent of the net earn-

ings during the period since the last dividend was declared until such contingent fund shall again be equal to at least five per cent of the amount credited to members. [Laws 1913, c. 110, § 13.]

§ 563. Losses Exceeding Reserve Fund.

Whenever the losses of an association exceed the contingent fund, or the reserve fund, if reserve fund stock has been issued as provided in section 6 [§ 555, ante] of this act, they may be charged against the undivided earnings, if any, and in the event that they also exceed such undivided earnings, shall be charged pro rata against all classes of shares according to the withdrawal value thereof. [Laws 1913, c. 110, § 14.]

§ 564. Limit of Expense Fund.

The expenses of such association shall be paid from its earnings, and no deduction from dues shall be made either directly or indirectly for that purpose. No such association shall pay or be or become liable to pay either directly or indirectly in the course of any calendar year as salaries, commissions, fees or other compensation to its officers, directors, auditor, attorneys, agents, clerks and all other employees and for rent, advertising, and all other operating expenses, sums of money the aggregate of which shall exceed two and one-half per cent of the average amount of assets of such association during such year. The term "operating expenses" as used in this connection shall not be construed to include membership fees, taxes, assessments, repairs or insurance on real estate or commissions on the sale of real estate, or on the placing of loans, or any interest which the association may have paid or become liable to pay, proper legal charges for searching titles or the preparation of legal papers, expenses of foreclosure suits or other bona fide litigation, nor charges for examinations made by the direction of the state auditor. The provisions of this section, in so far as they limit the expenditure for expenses, shall not apply to any association whose accumulated capital is less than forty thousand dollars: Provided, however, that the annual expenses of every such latter association shall not

exceed a total of one thousand dollars. The provisions of this section shall apply as well to foreign as to domestic corporations doing business under the permission and certificate of the state auditor and said auditor shall not renew such permission or issue such certificate to any corporation that shall have violated the provisions of this section. [Laws 1913, c. 110, § 15. Cf. § 3631, Rem.–Bal.]

§ 565. Withdrawals by Shareholders—Notice.

Shares shall not be withdrawn until after a lapse of three months from the time of issuance of such shares and not then except at the option of the association, and after one day's written notice of intention to withdraw such shares shall have been given subsequent to the expiration of such three months; but shares may be withdrawn at any time after one year from the time of issuance and after one day's written notice of such withdrawal has been given to the association. The withdrawing shareholder shall be paid the amount of the withdrawal value of the shares, as shown by the last prior distribution of profits and as determined by the by-laws, together with all the dues paid thereon since such distribution: Provided, that upon withdrawal of shares pledged to the association for a stock loan or stock loans, the association shall first deduct therefrom the indebtedness due the association. Withdrawals shall be paid in the order of their filing, except as hereinafter provided, and it shall be the duty of the secretary or other officer discharging such duties to enter upon each notice the order and date of such filing. Except as hereinafter provided, not more than two-thirds of the receipts of the association in any month shall be applied to the payment of withdrawals and matured shares without the consent of the board of directors. Whenever an application for withdrawal shall have been on file or the payment of matured shares demanded and either shall have remained unpaid for a period of six months, all the receipts of the association in any month from dues, loans repaid, and the proceeds of all other investments, shall, after the payment of expenses and general indebtedness, be applied toward the payment of withdrawals and matured stock;

and the board of directors, or the state auditor, in his discretion, may direct that withdrawals be paid upon a ratable and proportionate basis. After filing the notice of withdrawal provided herein, the withdrawing member shall be entitled to the dividends credited to the same class of shares, until the final payment of his shares is made; and membership in the association shall remain unimpaired so long as any accumulation remains to his credit. No officer, director, attorney, clerk or agent of such association, and no person in any way interested or concerned in the management of its affairs shall discount or directly or indirectly purchase a share of any such association, whether filed for withdrawal or not, except by payment therefor of the withdrawal value of such share as determined herein. The board of directors of any association may retire all classes of free shares by enforcing withdrawals of the same: Provided, that the by-laws shall clearly state the manner in which such withdrawals may be enforced: And provided also, That the holders thereof shall be paid the full value of the shares, including, in such case, their proportion of the contingent fund. [Laws 1913, c. 110, § 16. Cf. § 3627, Rem.–Bal.]

§ 566. Exemption of Shares from Taxation.

Shares held by members shall be exempt from taxation and the association itself shall not be taxable, except that its tangible personal and real property shall be taxed as other tangible personal and real property is taxed. [Laws 1913, c. 110, § 17. Cf. § 3634, Rem.–Bal.]

§ 567. Annual Report—Penalty.

On or before the first day of September in each year every savings and loan association doing business in this state shall deposit with the state auditor a report of its affairs and operations for the year ending on the 30th day of June immediately preceding. Such report shall be verified under oath by the president and secretary or by three directors of the association, and shall contain such information as the state auditor from time to time requests. Upon filing such report, there shall be paid to the state auditor for the state

general fund, in lieu of all other corporation fees or licenses, a fee determined as follows: If the assets of the association as shown by said report amount to fifty thousand dollars or less, a fee of ten dollars; if more than fifty thousand dollars and less than one hundred thousand dollars a fee of twenty dollars; if more than one hundred thousand dollars and less than two hundred fifty thousand dollars, a fee of thirty dollars; if more than two hundred fifty thousand dollars and less than five hundred thousand dollars, a fee of forty dollars; if more than five hundred thousand dollars and less than one million dollars, a fee of sixty dollars; and if more than one million dollars, a fee of one hundred dollars. If such association shall fail to furnish to the auditor of the state any report required by this act, at the time so required, it shall forfeit the sum of twenty-five dollars per day for every day such report shall be delayed or withheld; and an action shall be started in the name of the state to recover such penalty and the same shall be paid into the treasury of the state. After receiving such report, the auditor, if satisfied that such association has complied with all the provisions of this act and is entitled to do business in this state, shall issue a certificate stating the compliance with such provisions, and that such association is entitled to do business in this state, which certificate shall be in force for the period of one year unless sooner revoked. [Laws 1913, c. 110, § 18. Cf. § 3618, Rem.–Bal.]

§ 568. Supervision by State Auditor.

The state auditor shall have supervision of all such associations doing business in this state, and shall be charged with the execution of the laws of this state relating thereto. At least annually but not oftener than twice a year except in cases of extreme necessity he shall make or cause to be made an examination into the affairs of all such associations doing business in this state. Such examinations shall be made by an inspector of savings and loan associations to be appointed by the state auditor, and who shall hold office during his pleasure. Such inspector shall be paid for the time actually spent in examining the affairs of any association

at the rate of eight dollars per diem and railroad fare. Such compensation shall be paid by the association and where several associations are examined in the course of a single trip made by the examiner, the railroad fare shall be equitably proportioned by the state auditor among the associations so examined. All examinations made by such inspector shall be full and complete, and in making the same he shall have full access to, and may compel the production of all books, papers, moneys, and records of the association under examination, and may administer oaths to and examine the officers of such association or any person connected therewith as to its business and affairs, and any willful false swearing shall be deemed perjury and be punishable as such: Provided, whenever by the laws of the state under which any foreign association is organized, annual examinations of such association are required and are made pursuant thereto, then such foreign association shall not be examined hereunder: Provided, such foreign association shall furnish to the auditor of this state annually a certificate of the proper officer of such other state that he has made an examination pursuant to the laws of such other state, and that the affairs of such associaion are in accord with the laws of such other state: And provided further, that the auditor of this state may, whenever he deems it advisable, cause an examination of such foreign association to be made as is required in the case of associations organized under the laws of this state. [Laws 1913, c. 110, § 19. Cf. § 3619, Rem.–Bal.]

§ 569. When Attorney General Shall Sue.

Wherever it shall appear to the state auditor that the affairs of any savings and loan association are in an unsound condition or that it is conducting its business in an unsafe or unlawful manner, the state auditor shall at once notify the board of directors of such association, giving them twenty days in which to restore its affairs to a safe and sound condition or to discontinue its illegal practices. If after twenty days such restoration shall not have been made, or such illegal practices shall not have been discontinued, the state auditor shall direct the inspector of savings and

loan associations to take possession of all books, records and assets of every description of such association and hold and retain the possession of same pending the further proceedings herein specified. Should the board of directors, secretary or person in charge of such association refuse to permit the said inspector to take possession as aforesaid, the state auditor shall communicate such fact to the attorney general, whereupon it shall become the duty of the attorney general at once to institute such proceedings as may be necessary to place such inspector in immediate possession of the property of such association. Upon taking possession of the effects of the association as aforesaid said inspector shall prepare a full and true statement of the affairs and condition of such association, including an itemized statement of its assets and liabilities, and shall receive and collect all debts, dues and claims belonging to it and pay the immediate and reasonable expenses of his trust. Said inspector shall be required to execute to the state auditor a good and sufficient bond in a sum required by the state auditor conditioned upon the faithful discharge of his duties as custodian of such association, which said bond shall be approved by the state auditor, and the expense of which shall be borne by the association under examination.

When the condition of such association has been fully ascertained, and it shall appear that the affairs of said association are in fact in an unsound condition, or that it is in fact continuing its business in an unsafe or unlawful manner, the state auditor shall report the facts to the attorney general and it shall thereupon become the duty of the attorney general to institute proceedings in the superior court of the proper county for the appointment of a receiver and for the dissolution of such association, or such other proceedings as the occasion may require. [Laws 1913, c. 110, § 20. Cf. § 3620, Rem.–Bal.]

§ 570. Foreign Corporation Failing to Comply With Act Forfeits Rights.

Any savings and loan association organized under the laws of any other state or territory that shall remove any action

that shall be commenced against it in a court of this state to a United States court, or that shall fail to pay any judgment rendered against it upon a suit in any court in this state within sixty days after the rendition of final judgment in such case, or that shall fail to make reports to the state auditor as provided in this act, or to do any other act to be done or performed as required by law, and after the continued failure to do such act for twenty days after notice in writing from the state auditor of such failure, shall have no right or authority to do or transact any further business within the limits of this state, and the state auditor shall thereupon cause notice of the termination of such authority to do business to be mailed to such association, and to be published in some newspaper of general circulation at the capital of the state, and shall communicate the facts to the attorney general of this state, who shall institute such proceedings in the matter as the case may require: Provided, any such corporation may be again authorized to commence business upon such terms as the state auditor may deem just and proper, and upon full compliance with the provisions of this act. [Laws 1913, c. 110, § 21. Cf. § 3614, Rem.–Bal.]

§ 571. Doing Business Without Authority.

Any officer, director or agent of any savings and loan association or any other person who shall sell or issue or knowingly cause to be sold or issued to any resident of this state, any stock of said association while said association does not have on deposit with the state auditor as required by this act, securities of the value and at the time herein prescribed, or while such association shall not have the certificate of the state auditor authorizing it to do business as herein prescribed shall be guilty of a gross misdemeanor. [Laws 1913, c. 110, § 22. Cf. § 3623, Rem.–Bal.]

§ 572. Compliance With Present Law.

After the passage and approval of this act, it shall be unlawful for any person, association or persons or domestic associations not already organized and doing business under sections 3601 to 3638, both inclusive, of Remington and Ballinger's Annotated Codes and Statutes of Washington, to

conduct a business in the form or of a character similar to that authorized by this act without first incorporating under this act. After the passage and approval of this act no foreign association not already lawfully engaged in the state of Washington in the business of a savings and loan association shall be permitted to conduct such a business in this state, and hereafter no savings and loan associations organized under the laws of this state not already lawfully engaged in the business of a savings and loan association outside of the state of Washington shall be permitted to engage in business outside of this state: Provided, that no such association shall loan on property outside of this state more than the aggregate of the amount from time to time standing to the credit of members outside of the state. [Laws 1913, c. 110, § 23. Cf. § 3608, Rem.–Bal.]

§ 573. Advertisements.

It shall be unlawful for any savings and loan association to make, publish, or circulate any advertisement, sign, circular or statement intended or calculated to induce persons to purchase stock of such association in the belief that such stock is subject to withdrawal on demand or that a stipulated or agreed rate of interest or dividend is payable thereon, except as provided in section 6 [§ 555, ante]. [Laws 1913, c. 110, § 24.]

§ 574. Names.

After the passage and approval of this act, no person, association of persons, or corporation conducting a business not in the form and of a character similar to that authorized by this act shall have or continue to use for a part of its title or corporate name any combination of two or more of the following words, to wit: "building," "savings," "loan," "home," "association," or "society." [Laws 1913, c. 110, § 25. Cf. § 3602, Rem.–Bal.]

§ 575. Act Applies to Present Companies.

The powers, rights, duties, privileges and obligations of every association heretofore or hereafter organized and

doing business in the form or of a character similar to that authorized by this act, shall be governed, controlled, construed, extended, limited and determined by the provisions of this act, to the same extent and effect as if said association had been organized and incorporated under or pursuant to the provisions of this act, and the articles of incorporation, by-laws, and rules of every such association heretofore made or existing are hereby modified, altered and amended to conform with the provisions of this act and the same are declared void where such articles of incorporation, by-laws or rules are inconsistent with the provisions of this act; except that the obligations of any existing association, whether between such association and its shareholders or any one of them or any other person or persons or any valid contract between the shareholders of such association existing at the time this act takes effect shall not be in any way impaired by the provisions of this act; and with such exceptions every savings and loan association shall possess the powers, rights, duties and privileges, and be subject to the obligations, restrictions and liabilities conferred and imposed by this act, notwithstanding anything to the contrary in its articles of incorporation, by-laws or rules. All obligations to any such association heretofore contracted shall be enforceable by it and in its name, and demands, claims and rights of action against any such association may be enforced against it as fully and completely as they might have been enforced before. [Laws 1913, c. 110, § 26. Cf. § 3633, Rem.–Bal.]

§ 576. Penalty for Violations.

Every officer, director, agent or other employee of any savings and loan association, who shall willfully violate or fail to comply with any of the provisions of this act, shall be guilty of a misdemeanor. [Laws 1913, c. 110, § 27.]

§ 577. Acts Repealed.

Sec. 28. Sections 3601 to 3638 inclusive of Remington and Ballinger's Annotated Codes and Statutes of Washington,

and all acts and parts of acts in conflict herewith, are hereby repealed.

Sec. 29. This act shall take effect July first, 1913.

Passed the House February 14, 1913.

Passed the Senate March 12, 1913.

Approved by the Governor March 19, 1913.

TRUST COMPANIES.

(Also see State Banking Law following this Act.)

§ 588. Formation of Company.

[§ 3346, Rem.–Bal.] Seven or more persons of full age may become a trust company on the terms and conditions and subject to the liabilities prescribed in this act; the name of every company formed under this act shall contain the word "trust," but shall not be that of any other existing corporation of this state; the capital stock of such trust company hereafter organized shall not be less than one hundred thousand dollars: Provided, that in cities having less than 25,000 inhabitants such companies may be organized with $50,000 capital, and in cities having less than 10,000 inhabitants such companies may be organized with $25,000 capital, and shall be divided into shares of one hundred dollars each, all of which shall be paid in cash before any trust company shall be authorized to transact any business, and such payment shall be certified to the [Secretary of State] State Bank Examiner under oath by the president and treasurer or secretary of the trust company; hereafter no corporation shall be organized for the purpose of carrying on a trust company business in the state of Washington except under this act, and no company hereafter organized under any other act shall use the word "trust" as a part of its name: Provided, that this act shall not apply to any foreign corporations engaged in the business of loaning money on mortgage security which does not accept deposits or receive from citizens of the state of Washington property or money in trust or deposit or for investment. In case any foreign corporation whose name contains the word "trust," or whose articles of incorporation empower it to do a trust business, desires to engage in business of loaning money on mortgage security in this state, it shall file in addition to its articles of incorporation or association, a resolution of its governing board, duly attested by its president and secretary, expressly stating that it will not receive deposits in the state

of Washington or accept from citizens and residents of the state of Washington property and money, or either, in trust for investment. [Laws 1911, p. 500.]

See Laws 1907, section 50, duties of Secretary of State imposed on State Bank Examiner.

"Person" construed to be individual as distinct from corporation. (Denny Hotel Co. v. Schram, 6 Wash. 134, 32 Pac. 1002.)

A provision prohibiting use of word "trust" by other companies is germane to Laws of 1903, page 367, providing for trust companies. (State ex rel. Osborne etc. Co. v. Nichols, 38 Wash. 309, 80 Pac. 462.)

After the passage of the Laws of 1903, page 367, for trust companies, a pre-existing company could not adopt the word "trust" without complying with that act. (State ex rel. Osborne etc. Co. v. Nichols, 38 Wash. 308, 80 Pac. 462.)

A foreign corporation with trust company powers must comply with the trust company laws of this state. (State v. Nichols, 47 Wash. 117, 91 Pac. 632.)

Foreign company doing business in this state must comply with the law here. (Conaway v. Co-operative Home Builders, 65 Wash. 39, 117 Pac. 716.)

The fact that a realty company is conducting a trust business contrary to the statute is not ground for the appointment of a receiver in a suit by an individual, since only the state can question the acts of the company. (Frost v. Puget Sound Realty Assn., 57 Wash. 629, 107 Pac. 1029.)

§ 589. Certificate of Organization—What to Show.

[§ 3347, Rem.–Bal.] Such persons shall under their hands and seals execute and acknowledge an organization certificate in triplicate, which shall specifically state:

(1) The name by which the corporation shall be known.

(2) The place where its business is to be transacted.

(3) The amount of its capital stock, and the number of shares into which the same is to be divided.

(4) The name, residence and postoffice address of each member of the corporation.

(5) The term of its existence, not exceeding fifty years. [Laws 1903, § 2, p. 368.]

A corporation to do a trust business cannot be formed otherwise than in compliance with the Laws of 1903, page 317. (State ex rel. Gorman v. Nichols, 40 Wash. 437, 82 Pac. 741.)

§ 590. Filing of Certificate—Examination by State Bank Examiner—Publication of Proof.

[§ 3348, Rem.–Bal.] The certificate of incorporation shall be acknowledged as required for deeds of real estate, and shall be recorded in a book kept for that purpose in the office of the county auditor where the principal place of business of such trust company in this state is to be established, and with the Secretary of State: Provided, however, that before the corporation shall be authorized to transact business in this state other than such as relates to its formation and organization, the [Secretary of State] State Bank Examiner shall examine or cause to be examined, in order to ascertain whether the requisite capital of such corporation has been fully paid in cash, and if it appears from such examination that such capital stock has not been fully paid in cash, a certificate of authorization shall not be granted and no such corporation shall commence business until such certificate of authorization has been granted; but when it shall appear to the [Secretary of State] State Bank Examiner that the entire capital stock has been paid in, and that such trust company is lawfully entitled to commence business he shall give to such company a certificate under his hand and seal that such company is duly and legally organized under this act as a trust company, and authorized to transact business as such trust company in this state; the trust company shall cause such certificate of authority of the [Secretary of State] State Bank Examiner, issued in pursuance of this act, to be published once a week for at least four successive weeks next after the issuance thereof, in a newspaper of general circulation in the place where said trust company is established, and shall file proof of such publication with the [Secretary of State] State Bank Examiner. [Laws 1903, § 3, p. 368.]

See Laws 1907, section 50, duties of Secretary of State imposed on State Bank Examiner.

See note to section 3348, Bal.–Rem.

A corporation to do a trust business cannot be formed otherwise than in compliance with the Laws of 1903, page 317. (State ex rel. Gorman v. Nichols, 40 Wash. 437, 82 Pac. 741.)

§ 591. When Authorized to Do Business—Powers of Such Companies.

[§ 3349, Rem.-Bal.] As soon as the certificate of authority is issued by the bank examiner as provided in the preceding section, the persons named in the articles of incorporation and their successors shall thereupon and thereby become a corporation and shall have power:

(1) To act as the fiscal or transfer agent of any state, municipality, body politic or corporation, and in such capacity to receive and disburse money.

(2) To transfer, register and countersign certificates of stock, bonds, or other evidences of indebtedness, and to act as agent of any corporation, foreign or domestic, for any purpose now or hereafter required by statute or otherwise.

(3) To receive deposits of trust moneys, securities and other personal property from any person or corporation, and to loan money on real or personal securities, and to discount and negotiate promissory notes, drafts, bills of exchange and other evidences of debt; and to buy, sell and exchange coin and bullion.

(4) To lease, hold, purchase and convey any and all real property necessary for and convenient in the transaction of its business, or which the purposes of the corporation may require, or which it shall acquire in satisfaction or partial satisfaction of debts due the corporation under sales, judgments or mortgages, or in settlement or partial settlement of debts due the corporation from any of its debtors.

(5) To act as trustee under any mortgage or bond issued by any municipality, body politic or corporation, and to accept and execute any other municipality or corporate trust not inconsistent with the laws of this state.

(6) To accept trusts from, and execute trusts for, married women, in respect to their separate property, and to be their agent in the management of such property, or to transact any business in relation thereto.

(7) To act under the order, or appointment of any court of record as guardian, receiver or trustee of the estate of any minor, and as depository of any moneys paid into court,

whether for the benefit of any such minor or other person, corporation or party.

(8) To take, accept and execute any and all such legal trusts, duties and powers in regard to the holding, management and disposition of any estate, real or personal, and the rents and profits thereof, or the sale thereof, as may be granted or confided to it by any court of record, or by any person, corporation, municipal or other authority, and it shall be accountable to [all] parties in interest for the faithful discharge of every such trust, duty or power which it may so accept.

(9) To take, accept and execute any and all such trusts and powers of whatever nature or description as may be conferred upon or intrusted or committed to it by any person or persons, or by any body politic, corporation or other authority, by grant, assignment, transfer, devise, bequest or otherwise, or which may be intrusted or committed or transferred to it or vested in it by order of any court of record, and to receive and take and hold any property or estate, real or personal, which may be the subject of any such trust.

(10) To purchase, invest in and sell stocks, promissory notes, bills of exchange, bonds, debentures and mortgages and other securities; and when moneys [or securities for moneys] are borrowed or received on deposit, or for investment, the bonds or obligations of the company may be given therefor, but it shall have no right to issue bills to circulate as money.

(11) To be appointed and accept the appointment of assignee or trustee, under any assignment for the benefit of creditors of any debtor, made pursuant to any statute or otherwise.

(12) To act under the order or appointment of any court of record or otherwise as receiver or trustee of the estate or property of any person, firm, association or corporation.

(13) To be appointed and to accept the appointment of executor of, or trustee under, the last will and testament, or administrator with or without the will annexed, of the estate of any deceased person, and to be appointed and to act as guardian of the estate of lunatics, idiots, persons of

unsound mind and habitual drunkards: Provided, however, the power hereby granted to trust companies to act as guardian or administrator, with or without the will annexed, shall not be construed to deprive parties of the prior right to have issued to them letters of guardianship, or of administration, as such right now exists under the laws of this state; and, be it further provided, that no trust company or other corporation, organized under this chapter which advertises that it will furnish legal advice, construct and prepare wills or do other legal work for its customers shall be permitted to act in the capacity as executor, trustee, assignee or otherwise serve in any fiduciary capacity; any such trust company or other corporation whose officers or agents shall solicit legal business for and on behalf of such trust company or corporation shall be disqualified from acting as trustee, assignee or from serving in any fiduciary capacity and shall be ineligible for appointment as such in any of the courts of this state.

(14) To exercise the powers conferred on and to carry on the business of a safe deposit company.

(15) To collect coupons on, or interest upon, all manner of securities when authorized so to do by the parties depositing the same.

(16) To receive and manage any sinking fund of any corporation, upon such terms as may be agreed upon between such corporation and those dealing with it.

(17) Generally to execute trusts of every description not inconsistent with the laws of this state or of the United States.

(18) To receive money on deposit to be subject to check or to be repaid in such manner and on such terms, and with or without interest, as may be agreed upon by the depositor and the said trust company.

(19) To make and certify abstracts of title to real property and to insure any person or corporation claiming to own or to have any interest in any real property or encumbrance thereon by mortgage, lease, lien, contract or otherwise against loss by reason of liens, encumbrances or imperfections of title, or any adverse claim of title: Provided,

however, that no company organized under this chapter shall be subject to any other insurance law of the state of Washington. Provided, further, that no trust company engaged in the business of banking shall be permitted to do any of the acts mentioned in this subdivision. [Laws 1913, c. 177; Laws 1907, § 1, p. 234.]

§ 592. Directors—Election, Qualification and Term of Office. [§ 3350, Rem.–Bal.] The affairs of every such corporation shall be managed and its corporate powers exercised by a board of directors of such number, not less than seven nor more than thirty, as from time to time may be prescribed in its by-laws. No person can be a director who is not the holder of at least ten shares of the capital stock of the corporation. The persons named in the articles of incorporation shall constitute the first board of directors, and may add to their number not exceeding the limit of thirty, and shall severally continue until others are elected to fill their respective places. Within six months from the time when such corporation shall commence business, the first board of directors shall classify themselves by lot into three equal classes, as nearly as may be. The term of office of the first class shall expire on the third Wednesday of January next following such classification; the term of office of the second class shall expire one year thereafter; and the term of office of the third class shall expire two years thereafter. At or before the expiration of the term of the first class, and annually thereafter, a number of directors shall be elected equal to the number of directors whose term will then expire, who shall hold office for three years, or until their successors are elected and qualified. Such elections shall be held at the office of the corporation and at such time and upon such public notice not less than ten days, by advertisement in at least one newspaper as shall be prescribed in the by-laws. In case of failure to elect any director on the day named, the directors whose term of office does not that year expire may proceed to elect a number of directors equal to the number in the class whose term that year expires, or such number as may have failed of re-election. The persons so elected, together with the directors, whose term of

office shall not that year expire, shall constitute the board of directors until another election shall be held according to law. Vacancies occurring in the intervals of election shall be filled by the board. Each director when appointed or elected shall take an oath that he will, so far as the duty devolves upon him diligently and honestly administer the affairs of such corporation, and will not knowingly violate, or willingly permit to be violated, any of the provisions of law applicable to such corporation, and that he is the owner in good faith and in his own right of the number of shares of stock required by this section, subscribed by him or standing in his name on the books of the corporation, and that the same is fully paid, is not hypothecated or in any way pledged as security for any loan or debt. Such oath shall be subscribed by the director making it, and certified by the officer before whom it is taken and shall be immediately transmitted to the [Secretary of State] State Bank Examiner, and filed and preserved in his office. [Laws 1903, § 5, p. 371.]

See Laws 1907, section 50, re duties of Secretary of State imposed on State Bank Examiner.

§ 593. Prohibited from Making Loans to Its Officers.

[§ 3351, Rem.–Bal.] No trust company now in existence or hereafter organized shall make any loan to any officer, stockholder or employee from its trust funds, and such trust company shall not permit any officer, stockholder or employee to become indebted to it in any way out of its trust funds; any president, vice-president, director, secretary, treasurer, cashier, teller, clerk or agent of any such corporation who knowingly violates this section, or who aids or abets any officer, clerk or agent in any such violation, shall be guilty of a felony and punished accordingly. (Laws 1903, sec. 6, p. 372.)

§ 594. Reports—To State Bank Examiner.

[§ 3352, Rem.–Bal.] Every such company shall make to the [Secretary of State] State Bank Examiner not less than two reports during each year, according to the forms which may be prescribed by him, verified by the oaths or affirmations of the president or vice-president and treasurer or sec-

retary of such corporation, and attested by the signatures of at least three directors; every such report shall exhibit in detail and under appropriate heads the resources and liabilities of the corporation at the close of business at any day past specified by the [Secretary of State] State Bank Examiner, and shall be transmitted to him within twenty days after the receipt of a request or requisition therefor by him, and an abstract or summary of every such report in such form as shall be prescribed by the [Secretary of State] State Bank Examiner shall be published by the trust company once in a newspaper published in the place where such trust company is established, and such proof of publication shall be furnished as may be required by the [Secretary of State] State Bank Examiner; such publications shall be made within two weeks after the filing of such report, the expense thereof to be borne by such trust company; the [Secretary of State] State Bank Examiner shall also have the power to call for special reports from any trust company whenever in his judgment the same are necessary to a full and complete knowledge of its conditions; every such trust company which fails to make and transmit any report required under this section shall be subject to a penalty of one hundred dollars for each day after the period herein specified that it delays to make and transmit its report, to be sued for and collected by the [Secretary of State] State Bank Examiner in the name and for the benefit of the state. [Laws 1903, § 7, p. 372.]

See Laws 1907, section 50, re duties of Secretary of State imposed on State Bank Examiner.

§ 595. False Entries, etc., a Misdemeanor.

[§ 3353, Rem.–Bal.] Every director, officer, agent or clerk of any trust company who willfully and knowingly subscribes or makes any false statement of facts, or false entries in the books of such trust company, or knowingly subscribes or exhibits any false paper, with intent to deceive any person authorized to examine as to the condition of such trust company, or willfully or knowingly subscribes to or makes any false reports, shall be deemed guilty of a misdemeanor and punished accordingly. [Laws 1903, § 8, p. 373.]

§ 596. Not to Loan on Its Own Stock as Security.

[§ 3354, Rem.–Bal.] No trust company shall make any loan on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall within one year from the time of its purchase be sold or disposed of at public or private sale: Provided, that nothing in this section contained shall apply to any loan made before the passage of this act. [Laws 1903, § 9, p. 373.]

§ 597. Deposits for Minors.

[§ 3355, Rem.–Bal.] When any deposit shall be made by or in the name of any minor, the same shall be held for the exclusive right and benefit of such depositor, and free from the control and lien of all other persons, except creditors of such minor, and shall be paid, together with the dividends and interest thereon, to the person in whose name the deposit shall have been made, and the receipt of acquittance of such minor shall be a valid and sufficient release and discharge for such deposit, or any part thereof, to the trust company. [Laws 1903, § 10, p. 374.]

§ 598. State Bank Examiner to Have Supervision Over and Inspect Same.

[§ 3356, Rem.–Bal.] Every trust company shall be subject to the inspection and supervision of the [Secretary of State] State Bank Examiner, and it shall be the duty of said [Secretary of State] State Bank Examiner either personally or by some person or persons to be appointed by him, whenever he shall deem it expedient, or at the request of any such trust company, to examine any such trust company, and it shall be the duty of the officers and employees of such trust company to exhibit its books, securities, records and accounts to the person or persons authorized by said [Secretary of State] State Bank Examiner to conduct the examination, and otherwise to facilitate the same so far as it may be in their power; the said [Secretary of State] State Bank Examiner, or any examiner appointed by him, shall have power to examine under

oath or affirmation the directors, officers and employees of any such trust company relative to its business and affairs, and for that purpose any such examiner shall have power to administer oaths and affirmations. [Laws 1903, § 11, p. 374.]

§ 599. Insolvency—State Bank Examiner to Take Possession—Duty of Attorney General.

[§ 3357, Rem.–Bal.] Whenever it shall appear to the [Secretary of State] State Bank Examiner from any report submitted for examination made under the provisions of this act that the affairs of any trust company are in an unsound condition because of illegal or unsafe investments, or that its liabilities exceed its assets, or that it is transacting business without authority or in violation of law, or that it is unsafe or inexpedient for such trust company to continue business, it shall be the duty of the Attorney General, on notice by the [Secretary of State] State Bank Examiner, to institute such proceedings against the trust company as the nature of the case may require; if from any such examination the [Secretary of State] State Bank Examiner shall have reason to conclude that any such trust company is in an unsafe or unsound condition, he may forthwith take possession of such trust company's property and business and retain such possession until the termination of the action or proceeding instituted by the Attorney General, or until the appointment of a receiver; and pending such possession by the [Secretary of State] State Bank Examiner, or such proceedings by the Attorney General, all the remedies at law or in equity of any creditor or stockholder against the said trust company shall be suspended. [Laws 1903, § 12, p. 374.]

See Laws 1907, section 50, re duties of Secretary of State imposed on State Bank Examiner.

§ 600. Refusal to Submit to Examination—Violation of Law.

[§ 3358, Rem.–Bal.] If any trust company shall refuse to submit its books, papers and concerns to the inspection of the [Secretary of State] State Bank Examiner or any examiner appointed by him, or if any director or officer thereof shall refuse to submit to be examined upon oath touching the concerns

of such trust company, the [Secretary of State] State Bank Examiner may report the fact to the Attorney General, who may proceed against said trust company as the nature of the case may require; if it shall appear to the [Secretary of State] State Bank Examiner that any trust company has violated its charter or any law of this state binding upon it, or is conducting business in an unsafe or unauthorized manner, he shall by an order under his hand and official seal, addressed to such trust company, direct a discontinuance of such illegal and unsafe practices, and conformity with the requirements of its charter and safety and security in its transactions; in case such trust company shall refuse or neglect to comply with such order, the [Secretary of State] State Bank Examiner may report the fact to the Attorney General, who may proceed against the trust company as an insolvent corporation. [Laws 1903, § 13, p. 375.]

See Laws 1907, section 50, re duties of Secretary of State imposed on State Bank Examiner.

§ 601. Trustees, Executors, etc.—Duty as.

[§ 3359, Rem.–Bal.] In all cases where any corporation in this state authorized by its charter to act as trustees, executors, administrators or guardians, shall be appointed executor, administrator or trustee of any estate or guardian of any infant, it shall and may be lawful for the president, cashier, or treasurer of such corporation to take and subscribe for such corporation any and all oaths or affirmations required to be taken or subscribed by such executor, administrator, trustee or guardian. [Laws 1903, § 14, p. 375.]

§ 602. Liability of Stockholders.

[§ 3360, Rem.–Bal.] If default shall be made in the payment of any debt or liability contracted by such corporation, the stockholders thereof shall be individually responsible, equally and ratably, for the then existing debts of the corporation, but no stockholder shall be liable for the debts of the corporation to an amount exceeding the par value of the respective shares of stock by him held in such corporation at the time of such default. [Laws 1903, § 15, p. 375.]

§ 602a. Liability in Case of Forged Check.

[§ 3363, Rem.–Bal.] No bank or trust company shall be liable to a depositor for the payment by said bank or trust company of a forged or raised check, unless within sixty days after the return to the depositor of the voucher of such payment, such depositor shall notify the bank or trust company that the check so paid was raised or forged. [Laws 1907, p. 31, § 1.]

§ 603. Increase of Capital Stock, Amendments, etc.—How Made.

[§ 3361, Rem.–Bal.] Every trust company hereafter organized under this act may extend its corporate existence, change its name, increase its capital stock, make such other and further amendment, change or alteration as may be desired, or amend its charter or certificate of incorporation in the manner following: The board of directors shall pass a resolution declaring that such amendment, change or alteration is advisable and calling a meeting of the stockholders to take action thereon; the meeting shall be held upon such notice as the by-laws provide, and in the absence of such provisions, upon ten days' notice in writing, given personally, or by mail; if two-thirds in interest of the stockholders shall vote in favor of such amendment, change or alteration, a certificate thereof shall be signed by the president and secretary under the corporate seal, acknowledged or proved as in the case of deeds of real estate, and such certificate, together with the written assent, in person or by proxy, of two-thirds in interest of such stockholders, shall be filed in the department of the Secretary of State, and upon the filing of the same, the charter or certificate of incorporation shall be, and be deemed to be amended accordingly: Provided, that the certificate to be made and filed in pursuance to this section shall contain only such provisions as it would be lawful and proper to insert in an original certificate of incorporation made at the time of making such amendment, change or alteration; no change shall be made in the charter or certificate of incorporation of such trust company whereby the rights, remedies or security of existing creditors shall be in any manner impaired; said certificate or a

copy thereof, duly certified by the Secretary of State, shall be evidence in all courts and places. [Laws 1903, § 16, p. 376.]

§ 603a. Joint Deposits.

[§ 3364, Rem.-Bal.] When a deposit has been made, or shall hereafter be made in any bank or trust company transacting business in this state in the name of two or more persons, payable to any of such persons, such deposit or any part thereof, or interest, or dividend thereon, may be paid to any of said persons, whether the others be living or not, and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge to such bank or trust company for any payment so made. [Laws 1907, p. 141, § 1; Laws 1913, c. 9.]

§ 604. Fees to be Paid Secretary of State and State Bank Examiner.

[§ 3362, Rem.-Bal.] The [Secretary of State] State Bank Examiner shall require in advance the following fees:

†For filing articles of incorporation or certified copies of articles, or other certificates required to be filed in his office.....$10.00
†Issuing certificate of authority..... 10.00
†For each renewal certificate of authority..... 10.00
†For filing each semi-annual statement of condition... 10.00
†For making any examination required by this act..... 25.00
For furnishing copies of papers filed in his office, 20 cents per folio: Provided, that all fees so collected shall be paid to the State Treasurer.

[Laws 1903, sec. 17, p. 376.]

Filing articles or certified copy of articles with Secretary of State.....$25.00
Filing amendments to original articles, each..... 10.00
Annual license fee to July first..... 15.00
Foreign corporation, filing power of attorney..... 5.00

[Laws 1907, p. 270.]

†All fees except for filing the articles in the office of the Secretary of State are to be paid to the State Bank Examiner. (Laws 1907, sec. 50.)

BANKS—FORMATION AND REGULATION.

§ 605. Appointment of Examiner.

[§ 3290, Rem.–Bal.] The Governor shall appoint, by and with the advice of the Senate, a State Examiner for the state of Washington, whose term of office shall be four years, unless sooner removed, and until his successor is appointed and qualified. No person shall be appointed to such office who shall not be at the time of his appointment, and for at least two years previous thereto, a citizen of the state of Washington, and who has not had at least four years' experience in the banking business. Nor shall any person be eligible for such office who shall be at the time interested in any bank as owner, officer, or stockholder. [Laws 1909, § 1, p. 692.]

§ 606. Vacancy in This Office to be Filled.

[§ 3291, Rem.–Bal.] If a vacancy shall occur in the office of State Examiner, by death, resignation, or otherwise, the same shall be filled by appointment of the Governor, and such appointee shall hold office until the next ensuing session of the legislature. [Laws 1907, § 2, p. 518.]

§ 607. Deputy Examiners.

[§ 3292, Rem.–Bal.] The State Examiner may appoint two deputies and revoke such appointment at pleasure, who shall have the qualifications and possess the powers, and perform the duties attached by law to the office of the examiner. He may also employ from time to time such clerical assistance as shall be necessary to the proper conduct of his office. But in no case shall the expenses incident to the conduct of the office exceed the appropriation provided by legislative action. [Laws 1909, § 2, p. 692.]

§ 608. Examiner and Deputies to Give Bond.

[§ 3293, Rem.–Bal.] The State Examiner and his deputies shall, each before entering upon his office, take and subscribe an oath to faithfully discharge the duties of his office, and

shall each execute to the state of Washington a bond in the sum of twenty-five thousand dollars, with some surety company authorized to do business in this state, to be approved by the Governor, as surety, conditioned that he will faithfully and impartially discharge the duties of his office and pay over to the person entitled by law to receive it, all moneys coming into his hands by virtue of his office. The cost of such bonds to be paid by the state. [Laws 1907, § 4, p. 519.]

§ 609. Location of Office.

[§ 3294, Rem.–Bal.] The State Examiner may maintain an office at the state capitol, and there shall be, at his request, assigned to him suitable rooms in the state capitol building for conducting the business of his office; but such office may, with the consent of the Governor, be maintained at some other convenient banking center in the state. [Laws 1909, § 3, p. 693.]

§ 610. The Terms "Banking" and "Branch Bank" Defined.

[§ 3315, Rem.–Bal.] The term "banking" within the meaning of this act shall mean the negotiations for, the discounting of, promissory notes, drafts, bills of exchange and other evidence of indebtedness, receiving deposits, selling and buying exchange, coin and bullion, and loaning money on personal, real and other securities, and other kindred financial operations; and shall also be construed and held to mean the receiving of moneys on deposit, or savings account subject to withdrawal by any method within four months from the opening of such account or subject to withdrawal at any subsequent time on less than one month's notice, and shall include any mutual or co-operative savings company or association, or a trust company, receiving money from time to time from persons, associations or corporations, to be held subject to withdrawal as aforesaid, whether received as a direct deposit or by way of payment on stock or certificates in any such mutual or co-operative association. The provisions of this act shall not be construed to apply to building and loan nor savings and loan associa-

tions organized under or transacting business conformably to the laws of this state. The term "bank" as used in this act shall be taken to mean and include every association, company or corporation (except national banks, and foreign banks not authorized to receive deposits) transacting a banking business in this state. The term "branch bank," as used in this act, shall be taken to mean an office of deposit or discount other than the bank's principal place of business. [Laws 1913, c. 147, § 1; Laws 1909, § 4, p. 693.]

§ 611. Provisions Affect All Corporations Receiving Deposits.

[§ 3316, Rem.-Bal.] Any bank, branch bank, or foreign bank which shall receive money on deposit, whether on certificate or subject to check or payment on stock of co-operative savings associations, or other method of demand withdrawal, or subject to withdrawal by any method within four months from the opening of such account or subject to withdrawal at any subsequent time on less than one month's notice shall be considered as doing a banking business. And promissory notes, receipts, certificates or passbooks issued for money received on deposit or for payment on stock of co-operative associations where such promissory notes, receipts, certificates or passbooks authorize the owner or holder to withdraw money as aforesaid shall be held to be certificates of deposit for the purposes of this act. And every such corporation, bank, branch bank or foreign bank receiving deposits as herein defined and provided shall be subject to all the provisions of this act and shall be subject to the same regulations, visitations and control. [Laws 1913, c. 147, § 2; Laws 1907, § 7, p. 519.]

The statutory double liability of stockholders of an insolvent bank is a trust fund for the benefit of creditors, but it is secondary, i. e., in the nature of a suretyship, and is personal, not following the stock. (Wilson v. Book, 13 Wash. 676, 43 Pac. 939; Watterson v. Masterson, 15 Wash. 511, 46 Pac. 1041; Bennett v. Thorne, 36 Wash. 253, 78 Pac. 936; Shuey v. Holmes, 21 Wash. 223, 57 Pac. 818; Shuey v. Adair, 24 Wash. 378, 64 Pac. 536.)

Transfer by insolvent bank of property as security for loan not fraudulent per se. (Roberts v. Wash. Nat. Bank, 11 Wash. 550, 40 Pac. 225.)

General deposit after insolvency asset for payment of creditors. (Blake v. State Sav. Bank, 12 Wash. 619, 41 Pac. 909.)

Individual liability of officers of bank for receiving deposit after insolvency does not preclude criminal liability. (State v. Oleson, 35 Wash. 149, 76 Pac. 686; State v. Dix, 33 Wash. 405, 74 Pac. 570.)

Bank having notice of contract and having acquiesced therein is estopped to deny agent's authority. (Tootle v. First Nat. Bank, 6 Wash. 181, 33 Pac. 345; First Nat. Bank v. Gaddis, 31 Wash. 596, 72 Pac. 460; Roberts v. Wash. Nat. Bank, 11 Wash. 550, 40 Pac. 225; Rattelmiller v. Stone, 28 Wash. 104, 68 Pac. 168; Washington Nat. Bank v. Pierce, 6 Wash. 491, 33 Pac. 972.)

Relation between bank and depositor that of debtor and creditor. (Commercial Bank of Tacoma v. Chilberg, 14 Wash. 247, 44 Pac. 264; Blake v. State Sav. Bank, 12 Wash. 619, 41 Pac. 909.)

Criminal law of 1893, punishing bank officers receiving deposits knowing the bank to be insolvent, held applicable to incorporated banks, not to private bankers. (State v. Youngbluth, 60 Wash. 383, 111 Pac. 240.)

Under Laws of 1907, page 518, branch banks not confined to branches of foreign banks. (State ex rel. Flumerfelt v. Engle, 50 Wash. 207, 96 Pac. 1045.)

Failure to repudiate operation of branch bank within reasonable time after knowledge is ratification. (Ames v. Farmers & Mechanics' Bank, 48 Wash. 328, 93 Pac. 530.)

The bank cashing forged checks is liable to the bank on which they are drawn, which latter negligently in turn pays the check but not changing the position of the bank first cashing the check. (Canadian Bank v. Bingham, 46 Wash. 657, 91 Pac. 185.)

§ 612. Formation of Banking Corporations—Amount of Capital Required.

[§ 3317, Rem.–Bal.] Any number of persons, not less than three, may become incorporated, for the purpose of conducting and carrying on a general banking business, and also to establish banks to be known as savings banks, or to establish banks having departments for both classes of business, upon the terms and conditions of, and subject to the liabilities, prescribed in this act. It shall be unlawful for any corporation to transact a banking business unless at the time of organization and commencement of such banking business, such corporation has property of cash value as follows: In cities, villages and communities having a population of less than one thousand (1,000), ten thousand dollars ($10,000); in cities, villages and communities having a population of one thou-

sand (1,000) and less than two thousand (2,000) inhabitants, fifteen thousand dollars ($15,000); in cities having a population of two thousand (2,000) and less than three thousand (3,000) inhabitants, twenty thousand dollars ($20,000); in cities having a population of three thousand (3,000) and less than five thousand (5,000) inhabitants, twenty-five thousand dollars ($25,000); in cities having a population of five thousand (5,000) and less than ten thousand (10,000) inhabitants, thirty thousand dollars ($30,000); in cities having a population of ten thousand (10,000) and less than twenty-five thousand (25,000) inhabitants, fifty thousand dollars ($50,000); in cities having a population of twenty-five thousand (25,000) and less than fifty thousand (50,000) inhabitants, seventy-five thousand dollars ($75,000); and in cities having a population of more than fifty thousand (50,000) inhabitants, one hundred thousand dollars ($100,000). Such property shall be in lawful money as provided in section 12 of this act: Provided, that the provisions of this section as to the amount of capital shall not apply to any bank or trust company organized and doing business at the time of the passage of this act: But provided further, that the capital stock of any bank or trust company transacting business in this state, organized prior to the 12th day of June, 1907, shall be paid in full in cash within five months from the date upon which this act shall take effect. And a failure to comply with the provisions of this section shall subject any such bank or trust company to a penalty of one hundred dollars per day for each day of such failure, and such penalty may be collected by suit against such bank or trust company on the relation of the State Examiner, or attorney general. [Laws 1909, § 5, p. 693.]

"Person" construed to be individual as distinct from corporation. (Denny Hotel Co. v. Schram, 6 Wash. 134, 32 Pac. 1002.)

§ 613. Articles—What to Contain.

[§ 3318, Rem.-Bal.] The persons incorporating shall execute articles of incorporation, which shall specify:.

1. The name assumed by such bank.

2. The county and city or village where such bank is to be located and conduct its business.

3. The nature of its business, whether that of a commercial bank, savings bank or both.

4. The amount of its capital stock, which shall be divided into shares of one hundred dollars each.

5. The period for which such bank is organized, which shall not exceed fifty years.

Such articles shall be acknowledged before any officer authorized by the laws of this state to take acknowledgments. [Laws 1907, § 9, p. 521.]

§ 614. Filing of Articles.

[§ 3319, Rem.–Bal.] Such articles of incorporation shall be executed in quadruplicate, one copy of which shall be recorded in the office of the county auditor, in the county in which such bank is located; one filed with the State Examiner, one in the office of the Secretary of State, and one retained by the corporation. Such articles, or duly authenticated copies thereof, may be used as evidence in all courts of this state, for or against such bank. [Laws 1907, § 10, p. 521.]

§ 615. Power of Corporation.

[§ 3320, Rem.–Bal.] Upon making and filing the articles of incorporation as hereinbefore prescribed, such bank shall become a body corporate, and as such shall have power:

1. To adopt and use a corporate seal.

2. To have succession for the term of years mentioned in its articles of incorporation.

3. To make contracts.

4. To sue and be sued, the same as a natural person.

5. To elect directors, who shall have power to appoint such officers as may be necessary or convenient, to define their powers and duties, and to dismiss them at pleasure, and shall also have general superintendence and control of the affairs of such corporation.

6. To prescribe by its stockholders by-laws not inconsistent with law regulating the manner in which its stock shall be transferred, its directors and officers elected or appointed, its

stockholders convened, for general or special meetings, its property transferred, its general business conducted, and the privileges granted to it by law, exercised and enjoyed.

7. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such powers as shall be necessary to carry on the business of banking, as defined and regulated by this act: Provided, that no such bank shall transact any business except such as is necessarily preliminary to its organization until it has been authorized by the State Examiner to commence the business of banking. [Laws 1907, § 11, p. 521.]

§ 616. Payment of Capital Stock.

[§ 3321, Rem.–Bal.] At least fifty per cent of the capital stock of every incorporated bank shall be paid in before it shall be authorized to commence business, and the remainder of the capital of such bank shall be paid in in lawful money, in monthly installments of at least ten per cent of the whole of the capital, payable at the end of each succeeding month from the time it shall be authorized to commence business, and the payment of each installment shall be certified to the State Examiner under oath by the president, cashier, or treasurer of such bank. [Laws 1907, § 12, p. 522.]

Directors of a bank cannot enter into an agreement with the bank having any legal validity that they shall not be liable for stock subscriptions. (Barto v. Nix, 15 Wash. 563, 46 Pac. 1033.)

Where a director and trustee of a bank took stock of the bank and gave his note for it as an accommodation to the bank until the bank could sell the stock, it being agreed that he should not be liable on the note, held, the bank becoming insolvent, the director was liable in an action brought by a receiver of the bank. (Shuey v. Holmes, 22 Wash. 193, 60 Pac. 402.)

§ 617. Stockholders Failing to Pay—Stock to be Sold.

[§ 3322, Rem.–Bal.] Where any stockholder, or his assignee, shall fail to pay any installment on his stock when the same is required by the preceding section to be paid, the directors of such bank may sell the stock of such delinquent stockholder at public sale, having first given the delinquent stockholder twenty days' notice, personally or by mail, at his

last known address. If no bidder can be found who will pay for such stock the amount due thereon, with costs incurred, the amount previously paid shall be forfeited to the bank, and such bank stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold, it shall be canceled and deducted from the capital of the bank. If sold before cancellation, any surplus over the amount due on such stock to said bank, less all costs incurred thereon, with interest for the time delinquent, shall be returned to the original stockholder, his heirs or assigns. If such cancellation shall reduce the capital of the bank below the minimum required by this act, the said capital shall, within thirty days thereafter, be increased to the required amount by original subscription, in default of which, a receiver may be applied for by the State Examiner, to close up the business of the bank. [Laws 1907, § 13, p. 522.]

Where a director and trustee of a bank took stock of the bank and gave his note for it as an accommodation to the bank until the bank could sell the stock, it being agreed that he should not be liable on the note, held, the bank becoming insolvent, the director was liable in an action brought by a receiver of bank. (Shuey v. Holmes, 22 Wash. 193, 60 Pac. 402.)

§ 618. Banks may Commence Business, When.

[§ 3323, Rem.–Bal.] When articles of incorporation are filed with the State Examiner as provided by this act, and the bank transmitting the same notifies the State Examiner that at least fifty per cent of its capital stock has been paid in, and that such bank has complied with the conditions of this act, as required before the bank shall be authorized to commence business, the examiner shall examine into the condition of such bank, and if upon examination it appears that such bank is lawfully entitled to commence business, give to such bank a certificate under his hand and official seal, that it has complied with all the provisions of the law, and is duly authorized to transact business: Provided, however, that no foreign bank or branch thereof, except foreign banks now doing business in the state of Washington, shall do a banking business in the state until he or they shall have furnished to

the State Examiner evidence satisfactory to him that such foreign bank, or branch thereof, has invested in such foreign bank, or branch thereof, an amount of capital equal to that required of corporations engaged in similar business, and shall have received from such examiner a certificate authorizing him or them to do business as required in sections 8 and 12 of this act [3317, 3321, Rem.–Bal.] for corporations: Provided further, no bank in this state, or any officer or director thereof, shall hereafter open any branch bank, or any office of deposit or discount other than its principal place of business, and no branch bank heretofore opened shall be hereafter maintained unless the capital of the bank maintaining the branch bank shall be equal to the sum required by section 8 of the act of which this act is an amendment [3317, Rem.–Bal.], and unless the capital of said bank be increased by the amount required by said section 8 [3317, Rem.–Bal.] for each and every such branch, the payment of such increased capital shall be governed by the provisions in sections 12 and 13 of the act of which this act is an amendment [3321, 3322, Rem.–Bal.], and for the maintenance of any branch bank in violation of the provisions of this section every such bank and every such officer or director shall be subject to a penalty in the sum of one thousand dollars for every week during which any such branch bank shall be so maintained. And such penalty may be collected by suit against such bank, or officer, or director, on relation of the State Examiner, or attorney general. [Laws 1909, § 6, p. 695.]

§ 619. Transfer of Shares.

[§ 3324, Rem.–Bal.] The shares of stock of such incorporated bank shall be deemed personal property and shall be transferred on the books of the bank in such a manner as the by-laws thereof shall direct. No bank shall be the purchaser of its own capital stock, or accept its capital stock, or any part of it, as security for loans. No bank shall subscribe for or purchase the stock of any other banking corporation. [Laws 1909, § 7, p. 696.]

§ 620. Stock Books.

[§ 3325, Rem.–Bal.] A book shall be provided and kept by every bank in which shall be entered the name and residence of the stockholders thereof, the number of shares held by each, the time when such person became a stockholder, and also all transfers of stock, stating the time when made, the number of shares, and by whom transferred. In all actions, suits and proceedings, said book shall be presumptive evidence of the facts therein stated. [Laws 1907, § 16, p. 524.]

§ 621. Amendment of Articles of Incorporation.

[§ 3326, Rem.–Bal.] Any bank may amend its articles of incorporation, in any manner not inconsistent with the provisions of this act, by a vote of its stockholders representing two-thirds of the capital, at a regular meeting, or a special meeting duly called for that purpose. A certificate of the fact and terms of the amendment shall be executed by a majority of the directors, and filed as required for articles of incorporation, but no increase of capital stock shall be valid, until the amount thereof shall have been subscribed and actually paid in, and no reduction of the capital stock shall be made to an amount less than is required in section 8 [3317, Rem.–Bal.], for capital, nor be valid, nor warrant the cancellation of stock certificates, nor diminish the personal liability of the stockholders, until such reduction has been approved by the State Examiner. [Laws 1907, § 17, p. 524.]

§ 622. Liability of Stockholders.

[§ 3327, Rem.–Bal.] The stockholders of every bank shall be individually liable, equally and ratably, and not one for another, for the benefit of the creditors of such bank, to the amount of their stock at par value thereof, in addition to the stock held by them; but persons holding stock as executors, administrators, guardians or trustees if such relation of trust shall appear in the stock certificate and on the books of the bank, or as collateral security or in pledge, shall not be personally liable as stockholders, but the assets and funds in the hands of such trustee constituting the trust, shall be liable to the same extent as the testator, intestate, ward or person inter-

ested in such funds would be if living or competent to act, and the person pledging such stock shall be deemed a stockholder, and liable under this section. Such liability may be enforced by an action at law or suit in equity by any such bank in process of liquidation, or by any receiver or other person succeeding to the legal rights of such bank. [Laws 1907, § 18, p. 524.]

When a director and trustee of a bank took stock of the bank and gave his note for it as an accommodation to the bank until the bank could sell the stock, it being agreed that he should not be liable on the note, held, the bank becoming insolvent, the director was liable in an action brought by the receiver of the bank. (Shuey v. Holmes, 22 Wash. 193, 60 Pac. 402.)

The rule that stockholder's liability is secondary does not require primary assets to be exhausted before recourse is had to the stockholders. (Bennett v. Thorne, 36 Wash. 253, 78 Pac. 936.)

The receiver of an insolvent corporation is proper party plaintiff to enforce stockholder's liability. (Childs v. Blethen, 40 Wash. 340, 82 Pac. 405.)

§ 623. Directors—Election—Term of Office.

[§ 3328, Rem.–Bal.] The affairs of every such bank shall be managed by not less than three directors, who shall be elected by the stockholders, and hold office for one year, and until their successors are elected and have qualified. A majority of the board of directors shall constitute a quorum for the transaction of business. In the first instance the directors shall be elected at a meeting held before the bank is authorized to do business by the State Examiner, and afterward at the annual meeting of the stockholders to be held on the second Tuesday in January in each year. If for any cause no election is held at that time, it may be held at an adjourned meeting, or at a subsequent meeting called for that purpose, of which due notice shall be given, as may be provided in the by-laws of such bank. At all the meetings of the stockholders, each share shall be entitled to one vote, and any stockholder may vote by proxy in writing signed by him. Every director must be the owner in his own right of at least five shares of stock. He shall take and subscribe an oath that he will faithfully and diligently perform the duties of such office, and will

not knowingly violate or permit to be violated, any provisions of this act. Such oath shall be transmitted to the State Examiner, and filed in his office. Vacancies in the board of directors shall be filled by the board, and directors so appointed shall hold office until the next election, and until their successors shall have been elected and qualified. [Laws 1907, § 19, p. 525.]

§ 624. Dividends.

[§ 3329, Rem.–Bal.] The directors of any bank transacting business in this state may declare a dividend of so much of the net profits of the bank, after providing for all expenses, interest and taxes accrued, or due from such bank, as they shall judge expedient, but before any such dividend is declared, not less than one-tenth of the net profits of the bank for the preceding half-year, or for such period as is covered by the dividend, shall be carried to a surplus, until such surplus shall amount to twenty per cent of its capital stock: Provided, that accrued and uncollected interest on the assets of the bank shall not be distributed as a part of its earnings. [Laws 1909, § 8, p. 696.]

§ 625. Banks may Hold Real Estate, When.

[§ 3330, Rem.–Bal.] Any bank transacting business in this state, so far as not prohibited by the constitution of this state, may purchase, hold and convey real estate for the following purposes and no other:

1. Such as shall be necessary for the convenient transaction of its business, including with its banking offices, other apartments in the same building to rent as a source of income.

2. Such as shall be purchased by or conveyed to it in satisfaction, or on account of, debts previously contracted in the course of its business.

3. Such as it shall purchase at sale under judgments, decrees, liens, or mortgage foreclosures, against securities held by it: Providing, that no such real estate, except that used in the transaction of its business, shall be carried as an asset on the books of the bank for a longer period than five years from

the date of its purchase. [Laws 1907, § 21, p. 526; Laws 1913, c. 22.]

§ 626. Receiving Deposits When Insolvent—Penalty.

[§ 3331, Rem.–Bal.] The owners or officers of any bank who shall fraudulently receive any deposit, knowing that such bank is insolvent, shall be deemed guilty of a felony, and punished upon conviction thereof, by a fine not exceeding one thousand dollars, or imprisoned in the state penitentiary not exceeding ten years, or both such fine and imprisonment, at the discretion of the court. [Laws 1907, § 22, p. 526.]

Held, not to apply to private bankers. (State v. Youngbluth, 60 Wash. 383, 111 Pac. 240.)

§ 627. Reorganization as National Bank—Liabilities.

[§ 3332, Rem.–Bal.] Any state bank reorganized under the laws of the United States as a national bank, as soon as it shall have obtained a certificate from the Controller of the Currency authorizing it to commence business, under the United States banking laws, shall retain and hold all the assets, real and personal, which it acquired during its existence under this act, and shall hold the same subject to all existing liabilities against said bank at the time of its reorganization. [Laws 1907, § 23, p. 526.]

§ 628. Reorganization from National to State Bank—Liabilities.

[§ 3333, Rem.–Bal.] Whenever any bank existing under the laws of the United States is authorized to dissolve, and shall have taken the necessary steps to effect dissolution, it shall be lawful for a majority of the directors of such bank, upon the authority, in writing, of the owners of three-fourths of its capital stock, with the approval of the State Examiner, to execute articles of incorporation, as provided in this act, which articles, in addition to the requirements above, shall set forth the authority derived from the stockholders of such dissolved national bank, and upon filing the same as hereinbefore provided for the organization of banks, the same shall become a bank under the laws of this state, and thereupon all

assets of such dissolved national bank shall by act of law be vested and become the property of such state bank subject to all liabilities of such national bank not liquidated under the laws of the United States before such reorganization. [Laws 1907, § 24, p. 527.]

§ 629. Fraudulent Conveyances Void.

[§ 3334, Rem.–Bal.] Every transfer of its property or assets made by any bank in this state, after it shall have become insolvent, within the spirit of this act, with a view to the preference of one creditor over another, or to prevent the equal distribution of its property and assets among its creditors, shall be void. [Laws 1907, § 25, p. 527.]

§ 630. Checks not to be Certified Unless Funds are on Deposit.

[§ 3335, Rem.–Bal.] No owner, officer, agent, clerk or employee of any bank shall certify a check unless the amount thereof actually stands to the credit of the drawer on the books of the bank, and any person who shall willfully violate this provision, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine not exceeding one thousand dollars. Any such check so certified by a duly authorized person shall be a good and valid obligation of the bank in the hands of an innocent holder. [Laws 1907, § 26, p. 527.]

§ 631. Savings Banks.

[§ 3336, Rem.–Bal.] Any bank which shall designate its business as that of a savings bank shall have power to carry on the business of banking as prescribed and limited in this act, and may receive money on savings deposits, and such deposits shall be repaid to the depositor or his lawful representative, when required, at such time or times, and with such interest, as the regulations of the bank from time to time prescribe. A pass-book shall be issued to each savings depositor, containing the rules and regulations prescribed by the bank governing such deposits, in which shall be entered each deposit made by and each payment to such depositor. And no

payment made to such depositor, and no payment or check against any such savings account, shall be made, unless accompanied by and entered in the pass-book issued therefor, except for good cause and assurance, satisfactory to the bank officers; but nothing in this section shall prevent savings banks from issuing time certificates of deposit or certificates of deposit specifically issued subject to the rules and regulations governing savings deposits. [Laws 1907, § 27, p. 527.]

§ 632. Separate Books to be Kept.

[§ 3337, Rem.–Bal.] Any bank combining the business of a commercial bank and a savings bank shall keep with the respective depositors separate books of account for each kind of business. [Laws 1907, § 28, p. 528.]

§ 633. Deposits by Persons Under Disabilities—Payment.

[§ 3338, Rem.–Bal.] Where any deposit is made in any bank in his or her own name by any minor, married woman, or other person under disability such bank may pay such money on a check or order of such person, the same as in other cases, and such payments shall be in all respects valid in law. [Laws 1907, § 29, p. 528.]

§ 634. Use of Names Prohibited.

[§ 3339, Rem.–Bal.] No person or persons, association or body corporate, except banks, or trust companies, incorporated under the laws of the United States, or the laws of the state of Washington, and existing foreign banks now doing business in the state of Washington, shall advertise or put forth a sign having thereon any of the following words: "Bank," "Banking Company," "Trust," or any artificial or corporate name, or words indicating that such person, persons, association or body corporate is a bank, trust company, or savings bank, or shall in any way solicit or receive deposits as an incorporated bank. Every person, association, or body corporate, violating the provisions of this act, shall be fined not more than one thousand dollars ($1,000.00) per day for each day of such violation. From and after the first day of January, 1915, no person, persons, copartnership, as-

sociation, or body corporate except banks or trust companies incorporated under the laws of the United States or the laws of the state of Washington and existing foreign banks now doing business in the state of Washington, or mutual or co-operative savings companies or associations doing a banking business as defined in section 3315 of this act, shall transact a banking business in this state. [Laws 1913, c. 147, § 3; Laws 1907, § 30, p. 528.]

§ 634a. Unauthorized Use of Corporate Name.

[§ 3340, Rem.–Bal.] Any person or persons who shall put up, or cause to be put up, or exhibit, any sign or advertisement, purporting thereby to be an incorporated bank, or shall do business under a corporate name when they are not such, shall, on conviction thereof, be adjudged guilty of a misdemeanor, and punished by a fine not exceeding two hundred dollars. [Laws 1913, c. 147, § 5; Laws 1891, p. 130, § 38; 2 H. C., § 245; Bal., § 7174.]

§ 634b. Private Banks to Incorporate.

[§ 3339½, Rem.–Bal.] All firms or individuals who on January 1st, 1913, were conducting private banks and receiving deposits as such and who desire to do a banking business on and after January 1st, 1915, shall prior to that time incorporate under the laws of this state applicable thereto, and the capital stock of such corporation shall be in such sum as is required by existing law, all of which shall be subscribed and at least ten thousand dollars thereof paid in in cash, and the balance of said capital stock must be paid in at such time and in such amounts as shall be required by the state bank examiner. [Laws 1913, c. 147, § 4.]

§ 635. Act Does not Affect Transactions Already Had.

[§ 3341, Rem.–Bal.] Nothing in this act shall be construed to affect the legality of investments heretofore made, or of transactions heretofore had, pursuant to any provisions in force when such investments were made or transactions had. [Laws 1907, § 31, p. 529.]

§ 636. Loans to Officers—Liability of Directors.

[§ 3342, Rem.–Bal.] No officer or employee of any corporation transacting a banking business in this state shall be permitted to loan to himself any of the funds of the bank upon his own note or obligation, without first having obtained the approval of a majority of the board of directors of the bank, and the approval, if obtained, shall be made a part of its records. And if the directors of any bank shall knowingly permit any of its officers, directors, or employees of such bank to borrow its funds in an excessive and dishonest manner, every director who participated in and assented to the same, shall be held liable in his personal and individual capacity for all damages which the corporation, its shareholders, or any other person shall have sustained in consequence of such violation. [Laws 1907, § 32, p. 530.]

§ 637. Amount of Funds to be Kept on Hand.

[§ 3343, Rem.–Bal.] Every bank doing business under this act shall have on hand at all times, in available funds, not less than twenty per cent of its demand liabilities; such sums may consist of balances due it from good, solvent banks located at commercial centers, and at such other points as the State Examiner may approve, and actual cash, or checks on solvent banks located in the same city. [Laws 1907, § 33, p. 529.]

§ 638. Compensation and Expenses of Examiner.

[§ 3295, Rem.–Bal.] The State Examiner shall receive a salary of thirty-six hundred dollars a year, and each deputy state examiner shall receive a salary of two thousand four hundred dollars a year; and the State Examiner shall be allowed an additional sum as may be necessary, for clerical assistance in his office, office rent, traveling and other expenses, detailed vouchers for all of which shall be filed with his report. [Laws 1909, § 8 [9], p. 696.]

§ 639. Seal of Examiner—Instrument shall Bear Same.

[§ 3296, Rem.–Bal.] The State Examiner, with the approval of the Governor, shall devise a seal with a suitable inscription, for his office, a description of which, with a certifi-

cate of approval by the Governor, shall be filed in the office of the Secretary of State, with an impression thereof, which shall thereupon be and become the seal of office of the State Examiner. Every certificate, assignment and conveyance, executed by the said State Examiner in pursuance of the authority conferred upon him by law, and sealed with the seal of his office, shall be received as evidence and recorded in the proper recording offices, in the same manner and with like effect as a deed regularly acknowledged as required by law, and all copies of papers in the office of said Examiner, certified by him and authenticated by his seal, shall be received in evidence equally and in like manner as the originals. [Laws 1907, § 35, p. 530.]

§ 640. Banks to Make Reports—Publication.

[§ 3297, Rem.–Bal.] Every bank shall make at least three reports each year to the State Examiner, on days designated by the controller of the currency on which national banks shall make reports, according to forms to be prescribed by him, verified by the president, manager or cashier, and by two directors, which shall exhibit in detail, and under appropriate heads, the resources and liabilities of the bank, and shall be transmitted to the State Examiner within ten days of the receipt of a request therefor from him. And such report in condensed form, according to forms to be prescribed by the State Examiner, shall be published once in a newspaper of general circulation published in the place where the bank is located, or if there be no newspaper published in such place, then in some newspaper published in the same county. Proof of publication shall be transmitted to the State Examiner, within twenty days from the day fixed for such report. The State Examiner shall also have power to call for special reports from any bank whenever in his judgment the same is necessary, in order to obtain a full knowledge of its condition. [Laws 1909, § 10, p. 697.]

§ 641. Penalty for Failure to Report.

[§ 3298, Rem.–Bal.] Every bank which fails to make, transmit and publish any report required under the preceding

section shall be subject to a penalty of ten dollars ($10.00) per day for each day's delay after the period specified in said section. [Laws 1907, § 37, p. 530.]

§ 642. Examiner to Make Annual Report to Governor.

[§ 3299, Rem.–Bal.] The State Examiner shall receive and place on file in his office the reports required to be made by banks under this act, prepare and furnish to all such banks the blank forms for such statements or reports as may be by this act required of them; make on or before the first day of February of each year, a report for the preceding year to the Governor of this state, showing:

1. A summary of the conditions of the banks subject to his control at the date of their last report.

2. A list of banks which have been organized or closed during the year.

3. The amount of money collected and expended by him.

It shall be his duty to publish annually at the expense of the state, in pamphlet form at least five hundred copies of such report, and he shall furnish a copy of same free to each bank doing business under the provisions of this act, and shall furnish copies to any applicant upon payment of actual cost of printing thereof. [Laws 1907, § 38, p. 531.]

§ 643. Examination of Banks.

[§ 3300, Rem.–Bal.] It shall be the duty of the State Examiner, or his deputy, without previous notice to visit each and every bank doing business in this state, except national banks, at least once in each year and oftener if necessary, for the purpose of making a full and careful investigation and inquiry into the condition of affairs of such bank, and for that purpose the Examiner or deputy is hereby authorized and empowered to administer oaths and to examine under oath the owners and directors and all officers and employees and agents of such bank; and any willful false swearing in any such examination shall be deemed perjury and punished as such. [Laws 1907, § 39, p. 531.]

§ 644. Fee for Examination.

[§ 3301, Rem.–Bal.] The State Examiner shall collect from each bank for each complete examination of its condition, twenty-five dollars ($25.00) for each examination, and in addition thereto, one two-hundredths per cent (1–200%) on all deposits, including those of banks, and certificates of deposit at the time of the examination of the bank, but in no case shall the charge be more than two hundred dollars. All money collected under the provision of this section shall be paid into the general fund of the state: Provided, however, that no bank shall be required to pay for more than one examination in any one year. [Laws 1909, § 11, p. 697.]

§ 645. Impairment of Capital.

[§ 3302, Rem.–Bal.] Whenever it shall appear from any report of any bank, or whenever the Examiner shall have reason to believe that the capital of such bank is reduced by impairment or otherwise below the amount required by this act, or by its certificate or articles of incorporation, it shall be the duty of the Examiner to require such bank to make good the deficiency so appearing, or to reduce its capital in accordance with the provisions of section 17 of this act [3326, Rem.–Bal.]; and to give effect to such requisition he shall have the power to examine or cause to be examined any such bank, to ascertain the amount of any such impairment of capital, and whether his requirements have been complied with. And if such bank shall neglect for three months to comply with such requirements, the same shall be cause for the proceedings provided for in section 42 of this act [3303, Rem.–Bal.]. [Laws 1907, § 41, p. 532.]

§ 646. Violation of Act—Appointment of Receiver.

[§ 3303, Rem.–Bal.] If the State Examiner, upon examination of the affairs of any bank governed by this act, shall find that such bank has been guilty of violating its charter or the provisions of this act, or is conducting its business in an unsafe manner, he shall, by an order addressed to the bank so offending, direct discontinuance of such illegal or unsafe practices, and if such bank shall refuse or neglect to comply with such

order within a period of thirty days, he may immediately apply to the superior court of the county in which such bank has its principal place of business, for the appointment of a receiver of such bank, who, if he be appointed, shall proceed to administer the assets of the bank in accordance with law. [Laws 1907, § 42, p. 532.]

§ 647. Bank Under Control of Examiner.

[§ 3304, Rem.–Bal.] Any bank doing business under this act may place its affairs and assets under the control of the State Examiner by posting a notice on its front door as follows:

"This bank is in the hands of the State Examiner."

The posting of such notice, or the taking possession of any bank by the State Examiner, shall be sufficient to place all its assets and property of whatever nature in the possession of the State Examiner, and shall operate as a bar to any attachment proceedings. [Laws 1907, § 43, p. 532.]

§ 648. Examiner to Take Charge of Bank—Receivers.

[§ 3305, Rem.–Bal.] If upon examination made by the Examiner or his deputy, or from any report made to the Examiner, it shall appear that any bank is insolvent, it shall be the duty of the Examiner to immediately take charge of such bank and all the property and effects thereof. Upon taking charge of any bank, the Examiner shall as soon as possible, ascertain by a thorough examination into its affairs, its actual condition, and whenever he shall become satisfied that such bank cannot resume business, or liquidate its indebtedness to the satisfaction of all its creditors, he shall report the fact of its insolvency to the attorney general, who shall immediately upon receipt of such notice, institute proper proceedings in the proper court for the purpose of having a receiver appointed to take charge of such bank, and to wind up the affairs and business thereof for the benefit of its depositors, creditors and stockholders. The State Examiner may appoint a special deputy State Examiner to take charge of the affairs of an insolvent bank temporarily, until a receiver is appointed; such deputy shall qualify, give bond and receive compensa-

tion the same as a regular deputy; such compensation to be paid by such bank or allowed by the court in costs in the case of appointment of a receiver: Provided, that in no case shall any bank continue in charge of such special deputy for a longer period than ninety days: Provided further, that after a bank has been taken charge of by the State Examiner or a deputy, if it be ascertained upon examination, to the satisfaction of the Examiner, that the said bank is solvent, he may permit the same to be reopened, and it shall in that event repossess the officers of such bank with all of its funds and assets, after deducting therefrom the necessary expense incident to the charge and control thereof while in the hands of the Examiner. [Laws 1907, § 44, p. 533.]

§ 649. Compensation of Receivers.

[§ 3306, Rem.–Bal.] Receivers provided for in this act shall receive such compensation as shall be allowed by the court, but in no event to exceed the fees allowed executors and administrators in the administration of estates. [Laws 1907, § 45, p. 533.]

§ 650. Examiner to Keep Record of Fees Collected.

[§ 3307, Rem.–Bal.] It shall be the duty of the State Examiner to keep a record of all fees collected by him or his deputy, together with a record of the expense incurred in making the examinations of all banks, and pay to the State Treasurer at the times and in the manner prescribed by law, all fees collected, together with all funds received by him officially from whatsoever source, and he shall file with the State Treasurer, quarterly, an itemized statement showing from whom collected. [Laws 1907, § 46, p. 534.]

§ 651. Examiner not to Disclose or Make Public Information.

[§ 3308, Rem.–Bal.] The State Examiner shall keep proper books of record of all acts, matters and things done by him under the provisions of this act, as records of his office. Neither he nor his clerks shall disclose any fact or information obtained in the course of the business of the department, except so far as this act makes it their duty to make public

records and publish the same, and any violation of this prohibition shall subject the offender to prosecution for misdemeanor in any court of competent jurisdiction, and to punishment by fine not exceeding one thousand dollars, with imprisonment in the county jail until the same is paid; and such conviction shall subject the offender to a forfeiture of his office or employment. [Laws 1907, § 47, p. 534.]

§ 652. Distribution of Assets of Insolvent Banks.

[§ 3309, Rem.–Bal.] In distributing the assets of any bank for which a receiver has been appointed under the provisions of this act, the claims of depositors shall be given preference over all other claims except claims for labor: Provided, that this section shall not be so construed as to impair the rights of secured creditors. [Laws 1907, § 48, p. 534.]

§ 653. Attorney General to Act.

[§ 3310, Rem.–Bal.] The attorney general of the state shall conduct all actions, suits or proceedings begun by the State Examiner under the authority of this act. [Laws 1907, § 49, p. 534.]

§ 654. Duties Heretofore Performed by State Auditor and Secretary of State Hereafter Performed by Examiner.

[§ 3311, Rem.–Bal.] That all duties now required to be performed by and all responsibilities now imposed upon the auditor of this state, under the laws regulating the business of banking shall hereafter be performed by the State Examiner, and all reports and documents now on file in the state auditor's office pertaining to banks now in existence are hereby transferred to the custody of the Bank Examiner. That all duties now required to be performed by and all responsibilities now imposed upon the Secretary of State under chapter 176 of the Laws of 1903, relating to the inspection and supervision of trust companies, shall hereafter be performed by the State Examiner, and all reports and documents now in existence are hereby transferred to the custody of the Bank Examiner. [Laws 1907, § 50, p. 534.]

§ 655. Repeal of Former Banking Law.

[§ 3313, Rem.–Bal.] All acts and parts of acts regulating the organization and management of banks inconsistent with this act are hereby repealed, but nothing herein shall be held to repeal any law regulating trust companies, foreign banks and foreign bankers doing business in this state. [Laws 1907, § 52, p. 535.]

§ 656. Penalty for False Statement or Entry.

[§ 3314, Rem.–Bal.] Any person or persons who shall willfully and knowingly subscribe to or make or cause to be made any false statement or false entry in the books of any bank or corporation transacting a banking business or shall knowingly subscribe to or exhibit false or fictitious papers or securities with the intent to deceive any person or persons authorized to examine into the affairs of said bank or corporation, or shall make, state or publish any false statement of the amount of the assets or liabilities of any such bank or corporation, shall be deemed guilty of a felony and upon conviction thereof shall be imprisoned in the state penitentiary not less than one year nor more than ten years. [Laws 1907, § 53, p. 535.]

§ 657. Forfeiture for Violating Act.

[§ 3367, Rem.–Bal.] Every foreign bank or foreign banker, and every officer, agent or employee thereof, violating any of the provisions of this act, shall for each violation forfeit and pay to the state of Washington the sum of one thousand dollars. Said forfeiture may be recovered in an action by the attorney general in the name of the state of Washington in the superior court of the county where such bank or branch bank shall be located. [Laws 1905, § 3, p. 55.]

§ 658. Defining "Foreign Bank" and "Foreign Banker."

[§ 3368, Rem.–Bal.] In construing this act the terms "foreign bank" and "foreign banker" shall be deemed to include:

1. Every corporation not organized under the laws of the territory or state of Washington doing a banking business, except a national bank.

2. Every unincorporated company, partnership or association of two or more individuals organized under or pursuant to the laws of another state or country doing a banking business authorized by this act.

3. Every other unincorporated company, partnership or association of two or more individuals doing a banking business authorized by this act, if the members thereof, owning a majority interest therein, or entitled to more than one-half the profits thereof, or who would, if it were dissolved, be entitled to more than one-half the net assets thereof, are not residents of this state.

4. Every nonresident of this state doing a banking business authorized by this act in his own name and right only. [Laws 1905, § 4, p. 56.]

§ 659. Foreign Banks and Bankers—Not to Receive Deposits—Exceptions.

[§ 3365, Rem.–Bal.] Any foreign bank or foreign banker may keep an office for the purpose of loaning money and buying and selling exchange, coin or bullion, at any place or places within this state, but shall not in any manner, directly or indirectly, receive deposits: Provided, however, that nothing in this section contained shall prevent any existing branch of any foreign bank which was engaged in doing a banking business at any place or places within this state on the first day of January, 1905, or its successors or assigns becoming such prior to the date upon which this act takes effect, from receiving deposits and transacting a general banking business. [Laws 1905, § 1, p. 55.]

§ 660. Capital Stock Required.

[§ 3366, Rem.–Bal.] Every foreign bank or foreign banker heretofore having established, or hereafter establishing an office in this state shall have, and at all times maintain, at every such office, a capital not less in amount than that required by the national bank act for the organization of a national bank at the time when, and place where, such office was or shall be opened, and the payment of taxes on such amount shall be prima facie evidence of the payment and existence of

such capital; and no such foreign bank or foreign banker shall set forth on the stationery of such bank or banker or in any manner advertise a greater capital, surplus and undivided profits than are actually maintained at any such bank within this state. [Laws 1905, § 2, p. 55.]

DEPOSITORIES OF MONEY TO REPORT.

§ 661. To Make Return of Deposits Standing Inactive Ten Years—Notice to be Published.

[§ 3344, Rem.–Bal.] The cashier or secretary of every savings bank and loan society, and every institution in which deposits of money are made, shall, within fifteen days after the first day of December, in the year one thousand nine hundred and five, and within fifteen days of the first day of December of each and every second succeeding year thereafter return to the Secretary of State of the state of Washington a sworn statement showing the amount standing to his credit, the last known place of residence or postoffice address, and the fact of death if known, to said cashier or secretary of every depositor who shall not have made a deposit therein, or withdrawn therefrom any part of his deposit, or any part of the interest thereon for the period of more than ten years next preceding; and the cashiers and secretaries of such savings banks, savings and loan societies and institutions for deposit of savings shall give notice of these deposits in one or more newspapers published in or nearest to the city, county or town where such banks are situated at least once a week for four successive weeks, the cost of such publication to be paid pro rata out of said unclaimed deposits: Provided, however, that this act shall not apply to or affect the deposit made by or in the name of any person known to the said cashier or secretary to be living. The Secretary of State shall annually turn over all reports made by him to the attorney general for proceedings for forfeiture, if he shall be so advised. [Laws 1905, § 1, p. 244, c. 129.]

§ 662. Refusal to Make Report—Penalty.

[§ 3345, Rem.–Bal.] Any cashier or secretary of any of the banking institutions mentioned in section 1 of this act [3344, Rem.–Bal.] neglecting or refusing to make the sworn statement required by section 1 [3344, Rem.–Bal.] shall be

guilty of a misdemeanor and on conviction thereof shall be fined in any sum not less than fifty dollars nor more than one thousand dollars or confined in the county jail not less than ten days nor more than ninety days, or both such fine and imprisonment. [Laws 1905, § 2, p. 245, c. 129.]

CORPORATIONS OTHER THAN THOSE FORMED FOR THE PURPOSE OF PROFIT.

§ 663. Formation—Purposes.

[§ 3752, Rem.–Bal.] Corporations may be formed under the provisions of this act for any lawful purpose except the carrying on of a business, trade, avocation or profession for profit. [Laws 1907, § 1, p. 255.]

§ 664. Membership—No Capital Stock—Shares not to be Issued.

[§ 3753, Rem.–Bal.] The incorporators and members of a corporation formed under the provisions of this act may be individuals, copartnerships or corporations. It shall have no capital stock, and shares therein shall not be issued. The interest of each incorporator or member shall be equal to that of any other, and no incorporator or member can acquire any interest which will entitle him to any greater voice, vote, authority or interest in the corporation than any other member. [Laws 1907, § 2, p. 256.]

§ 665. Membership Certificates—Assignable.

[§ 3754, Rem.–Bal.] The corporation may issue membership certificates, which certificates shall be assignable under such provisions, rules and regulations as may be prescribed by the by-laws of the company. [Laws 1907, § 3, p. 256.]

§ 666. Termination of Membership.

[§ 3755, Rem.–Bal.] A membership in a corporation formed hereunder may be terminated by voluntary withdrawal, by expulsion and by death. Losses of membership through any such causes and the incidents thereof shall be governed by the by-laws of the company. [Laws 1907, § 4, p. 256.]

§ 667. Organization—Articles to be Filed.

[§ 3756, Rem.–Bal.] Not less than five individuals, copartnerships, or corporations shall be required to form a corporation hereunder. Articles of incorporation shall be prepared, executed and acknowledged in triplicate; one copy shall be filed in the office of the Secretary of State, another in the office of the county auditor of the county in which the principal place of business of the corporation is located, and the third retained in the possession of the corporation. Such articles shall state the name of the corporation, the purposes for which it is formed, the place where its principal place of business will be, the term for which it is to exist, not exceeding fifty years, the number of the trustees thereof, and the names of the trustees who shall manage the affairs of the corporation for such length of time, not less than two months, nor more than six months, as may be designated in such articles, until the trustees shall be elected by the members. The formation of the corporation shall be complete upon the filing of the articles as herein provided. [Laws 1907, § 5, p. 256.]

§ 668. Must Adopt By-laws Before Transacting Any Business.

[§ 3757, Rem.–Bal.] Before transacting any business or acquiring any property the members of the corporation must meet and adopt by-laws. The vote of a majority of all the members of the corporation shall be necessary to the adoption of such by-laws and when adopted the same must be written in a book to be kept by the corporation. The corporation may by its by-laws provide for the time, place and manner of calling and conducting its meetings, the number of trustees, the time of their election, their term of office, the mode and manner of their removal, the mode and manner of filling vacancies on the board caused by death, resignation, removal or otherwise, the power and authority of the trustees, the compensation of the trustees or of any officer, the mode and manner of conducting business, the mode and manner of conducting elections, the qualifications for membership, on what conditions there may be a succession of membership, the

manner in which membership shall cease, the mode and manner of expulsion of a member, the termination of a member's interest in the corporate property upon the cessation of his membership, and whether he shall be remunerated therefor, and if so in what manner, the amount of membership fee, and the dues, installments or labor which each member may be required to pay or perform, if any, the charges which may be made for services rendered or supplies furnished the members of the corporation by it, the manner of collection or enforcement of membership fees, dues or charges, and the method of forfeiting the membership interest for nonpayment or nonperformance, the method, time and manner of permitting the withdrawal of a member, if at all, and how his interest may be ascertained and payments made therefor, if the company decide that he should be reimbursed therefor, the formation of a surplus fund and the manner and proportions in which such surplus fund shall be distributed, either upon the order of the corporation or upon its dissolution, and generally, all such other matters as may be proper to carry out the purpose for which the corporation was formed. [Laws 1907, § 6, p. 257.]

§ 669. Powers of Corporations.

[§ 3758, Rem.–Bal.] Corporations formed under this act shall have power of succession by their corporate name for fifty years, in such name may sue and be sued in any court, may make and use a common seal and alter the same at pleasure, may receive gifts and devises, may purchase, hold and convey real and personal property, as the purposes of the corporation may require, may appoint such subordinate agents or officers as the business may require, may demand assessments of members and sell or forfeit their interests in the corporation for default with respect to any lawful provision of the by-laws, may enter into any lawful contracts and incur obligations essential to the transaction of its affairs for the purpose for which it was formed, may borrow money and issue notes, bills or evidence of indebtedness, and may mortgage its property to secure the same as its by-laws may provide, and, generally, may do all things necessary or proper to

carry out the purpose of its creation. [Laws 1907, § 7, p. 258.]

§ 670. Change of Purpose.

[§ 3759, Rem.–Bal.] The purpose or purposes for which a corporation is created hereunder may be altered, modified, enlarged, or diminished by the vote of two-thirds of all the members at a special meeting called for such purpose, notice of which meeting shall be given in the manner provided by the by-laws for the giving of notice for the election of trustees. [Laws 1907, § 8, p. 258.]

§ 671. Amendment of By-laws.

[§ 3760, Rem.–Bal.] The by-laws of the corporation shall prescribe the manner in which they may be amended. [Laws 1907, § 9, p. 258.]

§ 672. Dissolution—Cannot Have Receiver, When.

[§ 3761, Rem.–Bal.] Any corporation formed under this act may be dissolved and its affairs wound up voluntarily by the written request of two-thirds of the members. Such request must be addressed to the trustees and specify reasons why the winding up of the affairs of the corporation is deemed advisable, and name three persons, members of the corporation, to act in liquidation. Upon the filing of such request with the trustees, and a copy thereof in the office of the Secretary of State, and of the county auditor of the county where the principal place of business of the corporation is located, the power of the trustees shall cease and the persons appointed shall proceed to wind up the corporation, realize upon its assets, pay its debts and divide the residue of the money among the members in the proportion to which each member is entitled under the by-laws. This shall be done within the time designated in such request or such further time as may be granted by writing signed by two-thirds of the members and filed in the office of the Secretary of State and of the county auditor of the county where the principal place of business of the corporation is located. No receiver of such a corpora-

tion or of its property, or of any right therein, can be appointed by any court upon the application of any member save after judgment of dissolution in an action brought by the state to forfeit its franchise. [Laws 1907, § 10, p. 258.]

§ 673. Shall not Engage in Business for Gain, etc.

[§ 3762, Rem.–Bal.] Any corporation formed under the provisions of this act that shall engage in any business, trade, avocation or profession for gain or which shall enter into any agreement or combination in restraint of trade, or to fix or establish the price of any commodity, or to limit or regulate the production or distribution of any commodity, or which shall attempt to restrain trade, or fix or establish the price of any commodity, or limit or regulate the production or distribution of any commodity shall forfeit its right to exist as a corporation and judgment of dissolution may be entered in an action brought by the state to have such forfeiture declared. Nothing herein contained shall be construed to forbid such a corporation accumulating a surplus fund through membership fees and dues, or from charges made its members for services rendered or supplies furnished them by it, and the distribution of such fund among the members in the manner provided by the by-laws. [Laws 1907, § 11, p. 259.]

§ 674. Existing Corporations may Reorganize Under Act.

[§ 3763, Rem.–Bal.] Any corporation heretofore formed under any law of this state, the purpose or purposes for the creation of which is such that it might have been formed and carry on business hereunder, may avail itself of the privileges and incur the liabilities prescribed by this act upon a majority vote of all the members to the effect that it desires to reorganize hereunder, the result of such vote to be evidenced by a certificate executed by the president and secretary under the seal of the corporation and filed in the office of the Secretary of State and of the county auditor of the county where the principal place of business of the corporation is located. Upon the filing of such certificate it shall be endowed with all the privileges and affected by all the liabilities prescribed here-

under, but the time of its existence fixed by its articles shall not be enlarged by such action. [Laws 1907, § 12, p. 259.]

§ 675. Filing and License Fee.

[§ 3764, Rem.–Bal.] All corporations formed under the provisions of this act shall pay to the Secretary of State, for the use of the state, the same fee for filing its articles of incorporation and the same annual license fee, as is prescribed by law for other corporations having a capital stock. [Laws 1907, § 13, p. 260.]

RELIGIOUS, EDUCATIONAL, SOCIAL AND CHARITABLE CORPORATIONS.

§ 677. Formation of—Articles.

[§ 3731, Rem.–Bal.] Any two or more persons desirous of forming a corporation for a college, seminary, church, library, or benevolent, temperance, charitable or scientific society, shall make and subscribe written articles of incorporation in triplicate and acknowledge the same before any officer authorized to take the acknowledgment of deeds, and file one of such articles in the office of the Secretary of State, and another in the office of the county auditor of the county in which the principal place [of] business of the corporation is intended to be located, and retain the third in the possession of the corporation. Such articles shall specify:

1. The corporate name and location and chief place of business of such corporation.

2. If a joint stock company, the amount of capital stock, and the amount constituting a share; if not a joint stock company, then the terms of admission to membership.

3. The object for which the corporation is formed.

4. By what officers the affairs of said corporation shall be managed, and when such officers are to be elected, or, if appointed, when and by whom such appointments are to be made. [Laws 1895, § 1, p. 347; Cd. 1881, § 2450; 1 H. C., § 1638; Bal., § 4438.]

"Person" construed to be individual as distinct from corporation. (Denny Hotel Co. v. Schram, 6 Wash. 134.)

§ 678. Powers of Such Corporations Enumerated.

[§ 3732, Rem.–Bal.] When such articles shall have been filed, as aforesaid, the persons who shall have signed and verified the same, and their successors, shall be a body politic and corporate, with perpetual succession; they shall be capable in law of suing and being sued, pleading and being impleaded, answering and being answered in all the courts of the state;

they may have a common seal, alter and change the same at pleasure; acquire, mortgage and sell property, personal and real, for the purpose of carrying out the objects of the corporation, and make by-laws, rules and regulations, as they may deem proper and best for the welfare and the good order of the corporation; and may amend the articles of incorporation by supplemental articles, executed and filed the same as the original articles: Provided, that such by-laws, rules and regulations be not contrary to the constitution and laws of the United States, and the existing laws of the state. [Laws 1886, § 1, p. 86; Cd. 1881, § 2451; 1 H. C., § 1639; Bal., § 4439.]

§ 679. Secret Societies—Articles—Where to be Filed and What to Contain.

[§ 3733, Rem.–Bal.] Any lodge, encampment of [or] other subordinate lodge of Free and Accepted Masons, Independent Order of Odd Fellows, Knights of Pythias, or other fraternal society, desiring to incorporate, shall make articles of incorporation in triplicate, and file one of such articles in the office of the Secretary of State and another in the office of the county auditor of the county in which the meetings of such lodge, chapter or encampment are held; such articles shall be signed by the presiding officer and the secretary of such lodge, chapter or encampment, and attested by the seal thereof, and shall specify:

1. The name of such lodge or other society, and the place of holding its meetings.

2. The name of the grand body from which it derives its rights and powers as such lodge or society.

3. The names of the presiding officer and the secretary having the custody of the seal of such lodge or society.

4. What officers shall join in the execution of any contract by such lodge or society to give it force and effect in accordance with the usages of such lodges or society. [Laws 1903, § 1, p. 118; Cd. 1881, § 2452; 1 H. C., § 1640; Bal., § 4440.]

§ 680. Filing Fee—With Secretary of State.

[§ 3734, Rem.–Bal.] The Secretary of State shall file such articles of incorporation in his office and issue a certificate of

incorporation to any such lodge or other society upon the payment of the sum of five dollars. [Laws 1903, § 2, p. 118.]

§ 681. Powers—Not Subject to License Fee.

[§ 3735, Rem.–Bal.] Such lodge or other society shall be a body politic and corporate with all the powers and incidents of a corporation upon its compliance with sections one and two of this act [3733, 3734, Rem.–Bal.]: Provided, however, that such fraternal corporation shall not be subject to any license fee or other corporate tax of commercial corporations. [Laws 1903, § 3, p. 118.]

§ 682. Waiver of Original Rights to Corporate Name.

[§ 3736, Rem.–Bal.] Any lodge or society, or the members thereof, having heretofore attempted to incorporate as a body under the provisions of an act entitled "An act to provide for the incorporation of associations for social, charitable and educational purposes," approved March 21st, 1895, such lodge or society may incorporate under its original corporate name by complying with the provisions of sections one and two of this act [3733, 3734, Rem.–Bal.]: Provided, that such lodge or society shall attach to and file with the articles of incorporation provided for in this act a certificate duly signed, executed and attested by the officers of the said corporation consenting to such reincorporation and waiving all rights of the original corporation to such corporate name. [Laws 1903, § 4, p. 119.]

§ 683. Colleges may Confer Degrees.

[§ 3737, Rem.–Bal.] Any college or seminary hereafter incorporated by the provisions of this chapter shall have power, and is hereby invested with authority, to confer the degrees usually conferred by such institution. [Laws 1873, § 4, p. 411; Cd. 1881, § 2453; 1 H. C., § 1641; Bal., § 4441.]

§ 684. Dissolution of Corporation.

[§ 3738, Rem.–Bal.] Any corporation desiring its dissolution may, by a three-fourths vote of all its members at some regular meeting, execute a surrender of all its corporate powers, and upon the filing of duplicate surrenders with the

said auditor and Secretary of State, the said corporation shall be dissolved to all intents and purposes. [Laws 1879, § 5, p. 411; Cd. 1881, § 2454; 1 H. C., § 1642; Bal., § 4442.]

§ 685. Validating Defective Articles.

[§ 3739, Rem.–Bal.] That all instruments purporting to be articles of incorporation for a college, seminary, church, library, or benevolent, charitable, or scientific society, made and executed in accordance with the provisions of chapter 9, title 18, of volume 1 of Hill's Annotated Statutes and Codes of Washington, or under and by virtue of the provisions of section 2450 to 2454, both inclusive, of the Code of Washington of 1881, except that the same have been acknowledged before an officer authorized by law to take the acknowledgment of deeds, and have not been sworn to by the trustees as by said laws required, or have been filed with the auditor of the county where the chief place of business of the corporation so purporting to be formed is located, instead of being recorded as by said laws required, or which are defective in both of said respects, are hereby declared to be, and are hereby made to be, good and valid articles of incorporation; and the corporations formed, or attempted to be formed by virtue of said articles of incorporation, are hereby declared to be, and are hereby made, good and valid, and existing corporations, with the same and as full powers, rights and liabilities as they would have had if the articles of incorporation had been executed and recorded as by law required, and that all acts, deeds, and proceedings had or done by said corporations, or under said articles of incorporation, and all rights acquired as to both real and personal property, and all obligations of every kind incurred by such corporations, are hereby made of the same force, effect and validity as if said articles of incorporation had been executed as required by law. [Laws 1895, § 1, p. 24; Bal., § 4443.]

The above-named provisions of Hill's Code and the Code of 1881 are preceding sections.

SOCIAL AND CHARITABLE ORGANIZATIONS.

§ 686. Agreement of Association.

[§ 3740, Rem.–Bal.] Two or more persons within this state who associate themselves together by an agreement in writing, as hereinafter described, with the intention of forming a corporation for any of the purposes hereinafter specified, upon complying with the provisions of sections 4, 5, and 6 of this act [3743–3745, Rem.–Bal.], shall be and remain a corporation. [Laws 1895, § 1, p. 400; Bal., § 4445.]

"Person" construed to be individual as distinct from corporation. (Denny Hotel Co. v. Schram, 6 Wash. 134, 32 Pac. 1002.)

§ 687. Associations, Objects of.

[§ 3741, Rem.–Bal.] Such association may be formed for any educational, charitable, benevolent or religious purposes; for the prosecution of any antiquarian, historical, literary, scientific, medical, artistic, monumental or musical purpose; for supporting any missionary enterprise having for its object the dissemination of religious or educational instruction; for promoting temperance or morality in this state; or other charitable or social bodies of a like character and purpose; for the establishment and maintenance of social clubs, and of places for reading-rooms, libraries or social meetings. [Laws 1895, § 2, p. 400; Bal., § 4446.]

§ 688. Agreement to State, What.

[§ 3742, Rem.–Bal.] The agreement shall state that the subscribers thereto associate themselves with the intention of forming a corporation, the name of the corporation, the purposes for which it is formed, the town or city—which shall be in this state—in which it is located, and if it has a capital stock, the amount thereof, and the number and par value of its shares. The name shall be one not previously in use by any existing corporation, and shall be changed only as hereinafter provided. [Laws 1895, § 3, p. 400; Bal., § 4447.]

§ 689. Subscribers, First Meeting of.

[§ 3743, Rem.–Bal.] The first meeting of the subscribers to such agreement shall be called by a notice signed by one or more thereof, stating the time, place and purpose of the meeting; a copy of which notice shall, seven days at least before the day appointed for the meeting, be given to each subscriber, or left at his usual place of business or place of residence, or deposited in the postoffice, postpaid, and addressed to him at his usual place of business or of residence. And whoever gives such notices shall make affidavit of his doings, which shall be recorded in the records of the corporation. [Laws 1895, § 4, p. 400; Bal., § 4448.]

§ 690. Temporary Secretary—Election of Officers.

[§ 3744, Rem.–Bal.] At such first meeting, including any necessary or reasonable adjournment, an organization shall be effected by the choice by ballot of a temporary secretary, and by the adoption of by-laws, and the election of a president, secretary, treasurer and a board of trustees, not less than three nor more than twenty-five in number, and such other officers as may be provided for by the by-laws. At such first meeting no person shall be eligible as an officer or trustee who has not subscribed to the agreement of the association, but any corporation now or hereafter organized under this act, may, by a by-law, increase or diminish the number of trustees, within the limits hereinbefore provided. The temporary secretary shall make and attest a record of the proceedings until the secretary has been chosen. [Laws 1905, § 5, p. 240; Bal., § 4449.]

§ 691. Certificate—Contents and Filing of.

[§ 3745, Rem.–Bal.] The president, secretary and a majority of the trustees shall forthwith make, sign and swear to a certificate setting forth a true copy of the agreement of association, with the names of the subscribers thereto, the date of the first meeting and the successive adjournments thereof, if any, and shall file such certificate in the office of the county auditor of the county wherein the organization is effected and

in the office of the Secretary of State, who, upon payment of a fee of five dollars, shall cause the same to be recorded in a book to be kept for that purpose, and shall thereupon issue a certificate in the following form:

STATE OF WASHINGTON.

Be it known that, whereas (here the names of the subscribers to the agreement of association shall be inserted) have associated themselves with the intention of forming a corporation under the name of (here the name of the corporation shall be inserted), for the purpose (here the purpose declared in the agreement of association shall be inserted), with a capital of (here the amount of the capital stock shall be inserted, or if there is no capital stock this clause shall be omitted), and have complied with the provisions of the laws of this state in such case made and provided, as appears from the certificate of the president, secretary and a majority of the trustees of said corporation, recorded in this office; now, therefore, I (here the name of the secretary shall be inserted) Secretary of the State of Washington, do hereby certify that said (here the names of the subscribers to agreement of association shall be inserted), their associates and successors, are legally organized and established as and are hereby made an existing corporation, under the name of (here the name of the corporation shall be inserted), with the powers, rights and privileges and subject to the limitations, duties and restrictions which by law appertain thereto.

Witness my official signature subscribed and the seal of the state of Washington hereunto affixed, this .... day of ..... in the year .... (In these blanks the day, month and year of execution of the certificate shall be inserted.)

The secretary shall sign the same and cause the seal of the state to be thereto affixed, and such certificate shall be conclusive evidence of the existence of such corporation. He shall also cause a record of such certificate to be made, and such corporation shall forthwith cause a certified copy of such record to be filed in the office of the auditor of the county wherein such corporation is located. [Laws 1895, § 6, p. 401; Bal., § 4450.]

§ 692. By-laws to Contain What.

[§ 3746, Rem.–Bal.] The corporation may prescribe by its laws the manner in which, and the officers and agents by whom the purposes of its incorporation may be carried out. The corporation may hold real and personal estate, and may hire, purchase or erect suitable buildings for its accommodation, to be devoted to the purposes set forth in its agreement of association, and may receive and hold in trust, or otherwise, funds received by gift or bequest, to be devoted by it to such purposes. And for the purposes of the corporation shall have power to issue its promissory notes, bonds or other obligations, to be secured by mortgages on its real estate and other property in such manner as may be provided by its by-laws. The board of trustees shall have power to sell or dispose of the whole or any part of the property, either real or personal, which the corporation may from time to time own, and to acquire other property, but shall not sell or dispose of or purchase real estate unless authorized so to do by the vote of two-thirds of all the stock represented or two-thirds of the members present at a meeting called for that purpose, written notice of which shall have been given to all stockholders or members at least thirty days previous thereto by mail, in such manner as shall be provided by the by-laws, which two-thirds vote must comprise at least a majority of all the stock or of the members of the corporation. Such notice shall set forth in full the matter or proposition to be considered at such meeting. Voting by proxy shall be allowed at such meeting. [Laws 1907, § 1, p. 127; Bal., § 4451.]

§ 693. Beneficiaries.

[§ 3747, Rem.–Bal.] The corporation organized for any purpose mentioned in section two [3741, Rem.–Bal.] may, for the purpose of assisting widows, orphans or other persons dependent upon deceased members, provide in its by-laws for the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto; and such fund so held shall not be liable to attachment by garnish-

ment or other process. And the associations may be formed under this act for the purpose of rendering assistance to such persons, and in the manner herein specified. [Laws 1895, § 8, p. 402; Bal., § 4452.]

§ 694. Death Fund.

[§ 3748, Rem.–Bal.] Any such beneficiary corporation or society may hold at any one time as a death fund, belonging to the beneficiaries of anticipated deceased members, an amount not exceeding one assessment from a general or unlimited membership, or an amount not exceeding in the aggregate one assessment from each limited class or division of its members: Provided, that nothing in this section shall be held to restrict such fund to less than ten thousand dollars. Such funds, while held in trust, shall be deposited in safe banking institutions, subject to sight drafts for distribution to the beneficiaries aforesaid. [Laws 1895, § 9, p. 403; Bal., § 4453.]

§ 695. Exempt from Operations of Insurance Laws.

[§ 3749, Rem.–Bal.] The provisions of the general laws relating to life insurance companies shall not apply to such beneficiary corporations, associations and societies. [Laws 1895, § 10, p. 403; Bal., § 4454.]

§ 696. Not Retroactive—Pre-existing Societies may Adopt.

[§ 3750, Rem.–Bal.] Nothing contained in this act shall affect the existence of any association or corporation heretofore formed under the provisions of any law in this state for any of the purposes mentioned in section two of this act [3741, Rem.–Bal.], [and] any such corporation may, at a meeting called for the purpose, vote to adopt the provisions of this act, and upon so voting and complying with the provisions of this section shall have the powers and privileges and be subject to the duties and obligations of corporations formed under this act. After so voting the corporation may file with the Secretary of the State a certificate signed and sworn to by its president, secretary, and a majority of its board of trustees, setting forth a copy of its articles of incorporation and of said vote, and the date of the meeting at which the vote was adopted, and the

Secretary of State, upon payment of a fee of five dollars, shall cause the same to be recorded, and shall issue a certificate in the following form:

STATE OF WASHINGTON.

Be it known that, whereas, (here the names of the original incorporators shall be inserted) have formally associated themselves with the intention of forming a corporation under the name of (here the name of the incorporation shall be inserted) for the purpose (here the purpose declared in the original articles of incorporation shall be inserted), under the provisions of (here the designation of the statute under the provisions of which organization was effected, shall be inserted), with a capital of (here the amount of capital stock as it stands fixed at the date of the certificate, shall be inserted; or if there is no capital stock this clause shall be omitted), and the provisions of the laws in this state in such case made and provided have been complied with, as appears from a certificate of the proper officers of said corporation, recorded [in] this office; now, therefore, I (here the name of the secretary is to be inserted), Secretary of the State of Washington, do hereby certify that said (here the name of the corporation shall be inserted) is legally organized and established as an existing corporation, with the powers, right and privileges, and subject to the limitations, duties and restrictions which by law appertain thereto.

Witness my official signature hereunto subscribed and the seal of [the] state of Washington hereunto affixed, this .... day of ....., in the year .... (In these blanks the day, month and year of execution of the certificate, shall be inserted.)

This certificate shall be signed, sealed and recorded, and filed in the same manner, and shall have the same effect as the certificate provided in section six [3745, Rem.–Bal.]. [Laws 1895, § 11, p. 403; Bal., § 4455.]

§ 697. Agreement, Amendment to.

[§ 3751, Rem.–Bal.] Whenever it is desired to amend in any particular within the scope of this act, the provisions of the

articles of agreement of any corporation organized or qualified under this act, such amendment or amendments shall be effected by the filing with the Secretary of State of a certificate signed and sworn to by the president, secretary and a majority of the board of trustees, which certificate shall be authorized by a vote of at least two-thirds of the stock represented or members of the corporation present at a meeting called and held for that purpose, in the manner prescribed by the by-laws and the Secretary of State shall, upon payment of a fee of five dollars, cause such certificate to be recorded, and shall issue a certificate in the following form:

STATE OF WASHINGTON.

Be it known that, whereas, (here the name of the corporation shall be inserted) a corporation heretofore duly organized, has, in accordance with the provisions of the laws of this state in such case made and provided, amended its articles of agreement as follows: (Here shall be inserted the nature of the amendment or amendments), as appears from a certificate of the proper officers of said corporation recorded in this office. Now therefore, I (here the name of the secretary is to be inserted), Secretary of the State of Washington, do hereby certify that such amendment (or amendments) ha.. been duly adopted as, and now are, a part of the articles of agreement of said corporation.

Witness my official signature hereunto subscribed and the seal of the state of Washington hereunto affixed, this .... day of ..... in the year .... (In these blanks the day, month and year of execution of this certificate shall be inserted.)

This certificate shall be signed, sealed and recorded, and filed in the same manner and shall have the same effect as the certificate provided for in section six [3745, Rem.-Bal.]. [Laws 1907, § 1, p. 128; Bal., § 4456.]

BENEVOLENT SOCIETIES FOR PROTECTION OF HOMELESS OR ABUSED CHILDREN.

§ 698. Who may Take Children—Surrender by Parents.

[§ 1700, Rem.–Bal.] Any benevolent or charitable society incorporated under the laws of this state for the purpose of receiving, caring for or placing out for adoption, or improving the condition of orphan, homeless, neglected or abused minor children of this state shall have authority to receive, control, and dispose of children under eighteen (18) years of age under the following provisions:

(a) When the father and mother or the person or persons legally entitled to act as guardian of the person of any minor child shall, in writing, surrender such child to the charge and custody of said society, such child shall thereafter be in the legal custody of such society for the purposes herein provided.

(b) In case of death or legal incapacity of a father or his abandonment or neglect to provide for his family, the mother shall have authority to make such surrender, and in case of the death or legal incapacity of a mother, or her abandonment of such child, then the father shall have authority to make such surrender.

(c) In all cases where the person or persons legally authorized to make such surrender are not known, any judge of superior court may cause a notice of hearing to be published in any newspaper of general circulation printed and published in the county, and if he deems it best for such orphan, homeless, neglected or abused child, he may surrender it to any benevolent or charitable society incorporated under the laws of Washington and having for its object the care of such children.

(d) When any child shall have been surrendered in accordance with any of the preceding clauses and such child shall have been accepted by such society, then, (but not other-

wise), the rights of its natural parents or of the guardian of its person (if any) shall cease and such corporation shall become entitled to the custody of such child, and shall have authority to care for and educate such child or place it either temporarily or permanently in a suitable private home in such manner as shall best secure its welfare. Such corporation shall have authority when any such child has been surrendered to it in accordance with any of the preceding provisions, and it is still in its control, to consent to its adoption under the laws of Washington. The custody or control of any such child by any such corporation or by any other corporation, institution, society or person may be inquired into, and, in the discretion of the court, terminated at any time by the superior court of the county where the child may be, upon the complaint of any person, and a showing that such custody is not in the interest of the child. [Laws 1903, § 1, p. 58.]

§ 699. When Children Taken by Process.

[§ 1701, Rem.–Bal.] Upon complaint of any person in writing other than an officer or agent of such society or corporation to any judge of the superior court, giving the names and residences of the parents, guardian, (if any) or next of kin of such child, so far as known, and alleging that the father of such minor child is dead, or has abandoned his family or is an habitual drunkard or is a man of notoriously bad character, or is imprisoned for crime, or has grossly abused or neglected such child, and that the mother of such child is an habitual drunkard, or imprisoned for crime, or an inmate of a house of ill-fame, or a woman of notoriously bad character or is dead, or has abandoned her family, or has grossly abused or neglected such child, and alleging that the welfare of such child requires that legal steps be taken to provide for its care and custody, a warrant shall issue directing the proper officer to take such child into custody and care for or dispose of it as such judge shall direct, until a hearing can be had, such proceedings shall have precedence of other causes, of which hearing not less than five days' notice shall be given to such parents, guardian or next of kin and such judge shall hear the allegations of the complaint and all testimony offered

for or against the same and determine whether in his judgment there is cause for a change in the care and custody of such child. If the judge shall decide to change the care and custody of such child, he may commit the child to the care and custody of any such benevolent society contemplated in this act which is willing to receive it, and such commitment shall carry with it the same powers and authority as above provided in case of voluntary surrender, or he may enter such findings and transmit the papers and a transcript of his proceedings to the county commissioners of the county in which the case arises and surrender such child to the care and custody of such commissioners and it may be disposed of without further notice to the parents, guardian or next of kin. [Laws 1903, § 2, p. 60.]

§ 700. Child a County Charge, Disposal of—Notice.

[§ 1702, Rem.–Bal.] When any minor is a county charge, the board of county commissioners, if they think the welfare of the child demands it, may surrender such child to the care and custody of any benevolent society or corporation without the consent of its parents unless within twenty days after the notice of the intention of such commissioners so to do, given in writing to parents, guardian or next of kin of such child so far as known, to said commissioners, such parents, guardian or next of kin shall provide for such child and relieve the county thereof and when any child has been so surrendered by the county commissioners, it may be disposed of as herein provided for the disposition of other children. (Laws 1903, sec. 3, p. 60.)

§ 701. Duties of Police Officer.

[§ 1703, Rem.–Bal.] When any officer or agent of any such society shall request a police officer, or other peace officer, to investigate or assist in the investigation of any alleged case of any such neglected or abused child, such officer shall immediately make or assist in such investigation and if he deem it proper shall forthwith take such child into custody without warrant, taking such child and reporting such case at once to the judge of the superior court for such proceedings as may

be proper under the provisions of this act. [Laws 1903, § 4, p. 61.]

§ 702. In Case of Minor Convicted of Charge, Punishable by Confinement in Reform School.

[§ 1704, Rem.–Bal.] When any minor under eighteen years of age shall be convicted on any charge, the punishment for which may be imprisonment or confinement in the reform school, the judge of the superior court, if he finds that the good of such minor demands it, and such minor is an orphan, or a homeless, neglected or abused minor within the terms of this act, or is a county charge, or the parents or guardian of such minor consent thereto, may suspend sentence and surrender the custody of such minor to any society, as is contemplated in this act, when such society is willing to receive such minor, until such minor shall attain the age of majority, or for a term of years to be fixed in the order of surrender, and such society may find a home for such minor and surrender his custody to the person providing such home for the term fixed in said order of surrender, which surrender by the society shall be approved by an order of said court: Provided, that nothing in this section shall be held to affect the natural rights of said minor or of his parents or guardian, except in the matter of his custody: And provided further, that if said minor shall fail to conform to the order of court fixing his custody, he may be apprehended and brought before the court, and the court may sentence said minor as provided by law, or resurrender him as the court may deem best for the interests of said minor. [Laws 1903, § 5, p. 61.]

§ 703. Guardianship of Persons Only.

[§ 1705, Rem.–Bal.] Nothing in this act shall entitle any such society to act as guardian or to have control of the estate of any minor child. [Laws 1903, § 6, p. 62.]

§ 704. Habeas Corpus—Effect of Proceedings.

[§ 1706, Rem.–Bal.] Upon the hearing of any writ of habeas corpus for the custody of any such child, if it appears that such child has been surrendered to any such corporation

under the provisions of this act such surrender shall be taken as prima facie evidence that such child was legally and properly surrendered to such corporation and that such corporation is entitled to the custody and control of such child under the provisions of this act. [Laws 1903, § 7, p. 62.]

§ 705. Expenses During Examination—Costs.

[§ 1707, Rem.–Bal.] The board of county commissioners shall pay the expenses of bringing the child before the court and caring for it pending a hearing under this act; when a child is surrendered to a benevolent society under the provisions of this act by the superior court, the county shall pay such society a reasonable compensation for the temporary care of such child until it is placed in a family but not to exceed fifty ($50) [dollars] in each case. No clerk, sheriff, police officer, member of the board of county commissioners or agent of any such society shall charge or be allowed any costs whatever in these proceedings, except where a complaint shall be adjudged to be without sufficient cause and malicious, in which event all costs shall be taxed against the complainant: Provided, that the provisions of this section shall not apply to cases under section five of this act [1703, Rem.–Bal.]. [Laws 1903, § 8, p. 62.]

CEMETERY ASSOCIATIONS.

§ 706. Associations may be Incorporated.

[§ 3643, Rem.–Bal.] Ten or more persons residing within any county of this state may associate themselves together be [by] an agreement in writing in the manner and form prescribed in an act entitled "An act to provide for the incorporation of associations for social, charitable and educational purposes," approved March 21, 1895, being contained in sections 4445 to 4456, inclusive, of Ballinger's Annotated Codes and Statutes of Washington, for the purpose of organizing themselves into a cemetery association, and upon complying with the provisions of said act, so far as applicable, they shall be and remain a corporation. [Laws 1899, § 1, p. 44.]

"Person" construed to be individual as distinct from corporation. (Denny Hotel Co. v. Schram, 6 Wash. 134.)

§ 707. Corporate Powers.

[§ 3644, Rem.–Bal.] All such associations shall have power to prescribe the terms on which members may be admitted, the number of its trustees and officers and the time and manner of their election or appointment and the time and place of meeting for the trustees and for the association, and to pass all such other by-laws as may be necessary for the good government of such association. [Laws 1899, § 2, p. 45.]

§ 708. May Hold Lands—Fund to be Created and Its Use—Debts.

[§ 3645, Rem.–Bal.] Such association shall be authorized to purchase or take by gift or devise, and hold land exempt from execution and from any appropriation to public purposes, for the sole purpose of a cemetery not exceeding eighty acres, which shall be exempt from taxation if intended to be used exclusively for burial purposes, and in no wise with a view to profit of the members of such association: Provided, that when the land already held by the association is all practically used then the amount thereof may be increased by

adding thereto not exceeding twenty acres at a time. Such association may by its by-laws provide that a stated percentage of the moneys realized from the sale of lots, donations or other sources of revenue, shall constitute an irreducible fund, which fund may be invested in such manner or loaned upon such securities as the association or the trustees thereof may deem proper. The interest or income arising from the irreducible fund, provided for in any by-laws, or so much thereof as may be necessary, shall be devoted exclusively to the preservation and embellishment of the lots sold to the members of such association, and where any by-laws have been enacted for the creation of an irreducible fund as herein provided for it cannot thereafter be amended, in any manner whatever except for the purpose of increasing such fund. After paying for the land, all the future receipts and income of such association subject to the provisions herein for the creation of an irreducible fund, whether from the sale of lots, from donations, rents or otherwise, shall be applied exclusively to laying out, preserving, protecting and embellishing the cemetery and the avenues leading thereto, and in the erection of such buildings as may be necessary or convenient for the cemetery purposes, and to paying the necessary expenses of the association. No debts shall be contracted in anticipation of any future receipts except for originally purchasing, laying out and embellishing the ground and avenues, for which debts so contracted such association may issue bonds or notes, and secure the same by way of mortgage upon any of its lands, excepting such lots as shall have been conveyed to the members thereof; and such association shall have power to adopt such rules and regulations as they shall deem expedient for disposing of and for conveying burial lots. [Laws 1899, § 3, p. 45.]

§ 709. May Sell Land.

[§ 3646, Rem.–Bal.] It shall be lawful for said trustees, wherever in their opinion any portion or portions of their lands are unsuitable for burial purposes, to sell such portion or portions, and apply the avails thereof to the general purposes of such association. [Laws 1899, § 4, p. 46.]

§ 710. Exemptions.

[§ 3647, Rem.–Bal.] Burial lots, sold by such association shall be for the sole purpose of interment, and shall be exempt from taxation, execution, attachment or other claims, lien or process whatsoever, if used as intended, exclusively for burial purposes and in no wise with a view to profit. [Laws 1899, § 5, p. 46.]

§ 711. Plat to be Recorded—Regulation of Grounds.

[§ 3649, Rem.–Bal.] All such associations shall cause a plan of their grounds and of the blocks and lots by them laid out, to be made and recorded, such blocks and lots to be numbered by regular consecutive numbers, and shall have power to inclose, improve and adorn the grounds and avenues, to erect buildings for the use of the association and to prescribe rules for the designation and adorning of lots and for erecting monuments in the cemetery, and to prohibit any use, division, improvement or adornment of a lot which they may deem improper. An annual exhibit shall be made of the affairs of the association. The plan, or plat, hereinbefore required, shall be recorded by the proper county auditor for a fee not to exceed ten cents a lot, and if the actual cost of recording the same shall be less than ten cents a lot, then said auditor shall record the same at the actual cost thereof. [Laws 1905, § 6, p. 123, c. 64.]

§ 712. Injury to Sepulture or Property—Penalty.

[§ 3651, Rem.–Bal.] Any person who shall willfully destroy, mutilate, deface, injure or remove any tomb, monument or gravestone, or other structure in any cemetery, or any fence, railing or other work for the protection or ornament of a cemetery tomb, monument or gravestone or other structure aforesaid or of any cemetery lot within a cemetery, or shall willfully destroy, cut, break or injure any tree, shrub or plant within the limits of a cemetery shall be deemed guilty of a misdemeanor and shall upon conviction thereof before any court of competent jurisdiction be punished by a fine not less than five dollars, nor more than five hundred dollars and imprisonment in the county jail for a term not less than one nor more

than thirty days, according to the nature and aggravation of the offense and such offender shall also be liable in an action of trespass in the name of said association, to pay all such damages as have been occasioned by his unlawful act or acts, which wrong, when recovered, shall be applied to the reparation and restoration of the property destroyed or injured as above. [Laws 1899, § 7, p. 47.]

§ 713. May Hold Property in Trust for Improvement of Cemetery.

[§ 3650, Rem.–Bal.] That all associations and companies owning cemeteries may take and hold any property, real and personal, bequeathed or given upon trust, to apply the income thereof under the direction of the trustees or managers of such associations or companies, for the improvement or embellishment of such cemeteries, or the erection or preservation of any buildings, structures, fences or walks erected or to be erected upon the lands of such cemetery associations or companies, or upon the lots or plots of any of the proprietors, or for the repair, preservation, erection or renewal of any tomb, monument, gravestone, fence, railing, or other erection in or around any cemetery lot or plot, or for planting and cultivating trees, shrubs, flowers or plants in or around any such lot or plot, or for improving or embellishing such cemeteries or any of the lots or plots in any other manner or form consistent with the design and purposes of such associations and companies, according to the terms of such grant, devise or bequest. [Laws 1905, § 1, c. 118.]

FEES AND LICENSE TAX.

§ 714. Filing Articles of Incorporation.

[§ 3709, Rem.–Bal.] Every corporation incorporated under the laws of this state, or of any state or territory in the United States or of any foreign state or country, required by law to file articles of incorporation in the office of the Secretary of State, shall pay to the Secretary of State a filing fee of twenty-five dollars. [Laws 1907, § 1, p. 270; Bal., § 4285.]

§ 715. Filing Amendment or Supplemental Articles.

[§ 3710, Rem.–Bal.] Every corporation, foreign or domestic, desiring to file in the office of the Secretary of State articles amendatory or supplemental, or certificates of increase or decrease of capital stock shall pay to the Secretary of State a fee of ten dollars. [Laws 1907, § 2, p. 270; Bal., § 4286.]

§ 716. Filing Appointment of Agent of Foreign Company.

[§ 3711, Rem.–Bal.] Every foreign corporation filing in the office of the Secretary of State a certificate of the appointment of an agent residing in this state, or a certificate of the revocation of such appointment of the resident agent, shall pay to the Secretary of State a fee of five dollars. [Laws 1907, § 3, p. 270.]

§ 717. Certified Copies.

[§ 3712, Rem.–Bal.] The fee for furnishing a certified copy of articles of incorporation, or articles amendatory or supplemental, or certificates of increase or decrease of capital stock, or certificate of appointment of resident agent, or certificate or revocation of appointment of resident agent, shall be five dollars. [Laws 1907, § 4, p. 271; Bal., § 4287.]

§ 718. Recording Fees, When.

[§ 3713, Rem.–Bal.] There shall be no charge for recording any of the documents mentioned in this act or for making or certifying to copies of same other than the fees in this act

prescribed, unless the document to be recorded or the copy to be certified shall exceed twenty folios, in which case there shall be a further charge of fifteen cents per folio for all such excess. [Laws 1907, § 5, p. 271; Bal., § 4288.]

§ 719. License Fee—Penalty for Nonpayment—Building and Loan Companies Excepted.

[§ 3714, Rem.–Bal.] Every corporation incorporated under the laws of this state, and every foreign corporation having its articles of incorporation on file in the office of the Secretary of State shall, on or before the first day of July of each and every year, pay to the Secretary of State, for the use of the state, the following license fees: Every corporation having a capital stock, fifteen dollars. Every corporation failing to pay the said annual license fee, on or before the first day of July of each and every year, and desiring to pay the same thereafter, and before the first day of January next following, shall pay to the Secretary of State, for the use of the state, in addition to the said license fee, the following further fee, as a penalty for such failure: The sum of two dollars and fifty cents: Provided, however, That building and loan companies paying special fees provided for in this act under which same are incorporated shall not be required to pay the regular fee provided herein. [Laws 1907, § 6, p. 271; Bal., § 4289.]

The year contemplated by the statute (Laws 1897, p. 135, sec. 5), for payment of license fee is the year beginning July 1st, not the calendar year. (State ex rel. Sterling Timber Co. v. Jenkins, 22 Wash. 494, 61 Pac. 141.)

Payment of license fee by foreign corporation is a matter exclusively between state and company, and cannot be raised by third person. (State ex rel. Ami Co. v. Superior Court, 42 Wash. 675, 85 Pac. 669.)

A corporation does not wholly lose its right to use of its corporate name until period for reinstatement has elapsed. (State ex rel. Harper v. Howell, 56 Wash. 694, 106 Pac. 470. See 122 Pac. 604; 123 Pac. 606.)

§ 720. Shall not Maintain Suit Unless License is Paid—Names to be Stricken from Records by Secretary of State.

[§ 3715, Rem.–Bal.] No corporation shall be permitted to commence or maintain any suit, action or proceeding in any

court of this state, without alleging and proving that it has paid its annual license fee last due. A certificate of the payment of such annual license fee, or any duplicate of such certificate under the seal of the Secretary of State, shall be prima facie evidence of such payment; and the Secretary of State is hereby required to issue such duplicate certificates, upon request, at a charge of twenty-five cents for each thereof. The State Board of Tax Commissioners may institute suits to enforce the payment of any license fee, due from any corporation, under this or any other law. Failure upon the part of any corporation to pay its annual license fee for a period of one year, from and after the date when such payment first became due, shall be prima facie evidence of the insolvency of such corporation, and the fact of such insolvency may be shown by the state or by any private person or corporation: Provided, that as to corporations now delinquent in the payment of their annual license fees for a period of one or more years, such presumption of insolvency shall not exist until after one year from the date of the passage of this act and the continuation of such delinquency. It shall be the duty of the Secretary of State to strike from the records of his office the names of all incorporations which have neglected for a period of two years to pay their annual license fees; and any corporation thereafter organized may take and shall have the exclusive right to use the corporate name of any corporation so stricken from the records: Provided, that no corporate name shall be so stricken from the records for a period of one year from the date of the passage of this act. [Laws 1907, § 7, p. 271.]

Forfeiture for failure to pay license fees violates no contract rights of creditors. (Hawley v. Bonanza Queen Min. Co., 61 Wash. 90, 111 Pac. 1073.)

This provision only goes to the capacity to sue, and is waived unless raised by demurrer or answer. (Pierson v. Northern Pac. R. Co., 61 Wash. 450, 452, 112 Pac. 509, 511; Thompson-Spencer Co. v. Thompson, 61 Wash. 547, 112 Pac. 655.)

Compliance with the section is not necessary in case of a foreign corporation not "doing business within the state." (Lilly-Brackett Co. v. Sonnemann, 50 Wash. 487, 97 Pac. 505.)

Whenever in the course of the case it appears that the defendant setting up a counterclaim is in default in payment of a license fee, the defendant cannot maintain further claim to affirmative relief. (North Star etc. Co. v. Alaska Yukon etc. Co., 63 Wash. 376, 115 Pac. 855.)

The section held to apply to foreign corporation maintaining marine superintendent at port in state. (Boston Towboat Co. v. Sesnon Co., 64 Wash. 375, 116 Pac. 1083.)

A coal mining company is not within this section. (Davies v. Ball, 64 Wash. 292, 116 Pac. 833.)

§ 721. Reinstatement of Delinquent Corporation.

[§ 3715a, Rem.–Bal.] Every corporation whose name has been or shall hereafter be, stricken from the records of the office of the Secretary of State in pursuance of law for failure to pay its annual license fee for two years is hereby authorized and permitted to apply to the Secretary of State for reinstatement at any time within six months from the approval of this act, or within six months after its name has been stricken from the records of the office of the Secretary of State. [Laws 1909, Sp. Sess., § 1, p. 57.]

§ 722. Condition—Prepayment of Fees and Penalty.

[§ 3715b, Rem.–Bal.] Any corporation so applying for reinstatement shall at the time of its application pay to the Secretary of State, for the use of the state, all license fees and penalties then due from it and the sum of twenty-five dollars as additional penalty, and upon the making of such application and such payment, it shall be the duty of the Secretary of State to enter upon his records a notation that such corporation is reinstated. [Laws 1909, Sp. Sess., § 2, p. 57.]

This section repealed by Laws 1911, § 2, p. 135; ruling of Attorney General.

§ 723. Rights Restored.

[§ 3715c, Rem.–Bal.] Thereafter such corporation shall have and enjoy the same rights and powers as if its name had never been stricken from the records, and all things done by it in the exercise of its corporate powers before such reinstatement are hereby validated and confirmed. [Laws 1909, Sp. Sess., § 3, p. 57.]

§ 724. Dissolution for Nonpayment.

[§ 3715d, Rem.–Bal.] If, however, within the period named within which a corporation may make application to be reinstated such corporation shall not have made such application, the Secretary of State shall enter upon his records a notation that such corporation is dissolved, and it shall thereupon be dissolved and the trustees of such corporation shall hold the title to the property of the corporation for the benefit of its stockholders and creditors to be disposed of under appropriate court proceedings. [Laws 1909, Sp. Sess., § 4, p. 57.]

See Laws 1911, § 2, p. 135.

§ 725. Adoption of Name of Delinquent Corporation.

[§ 3715e, Rem.–Bal.] The name of no corporation which has been stricken from the records of the office of Secretary of State for nonpayment of its annual license tax shall be adopted by another corporation until the expiration of the time within which such delinquent corporation is allowed in which to apply for reinstatement, or while such application for reinstatement is pending. [Laws 1909, Sp. Sess., § 5, p. 58.]

§ 726. Fee for Certifying Corporation Laws.

[§ 3716, Rem.–Bal.] The fee for furnishing and certifying to a printed compilation of the corporation laws of this state shall be five dollars. [Laws 1907, § 8, p. 272.]

§ 727. Not to Apply to Certain Corporations.

[§ 3717, Rem.–Bal.] This act shall not apply to domestic corporations organized for religious, social, charitable or educational purposes, or to foreign corporations organized for like purposes, when not engaged in this state in the loaning of money or the conducting of any other business pursuits for profit. [Laws 1907, § 9, p. 272; Bal., § 4290.]

REINSTATEMENT PROVISIONS.

§ 728. Application for Reinstatement—Dissolution.

That section 3715a of Remington and Ballinger's Annotated Codes and Statutes of Washington be, and the same is hereby, amended to read as follows: Section 3715a. Every corporation whose name has been, or shall hereafter be, stricken from the records of the office of the Secretary of State in pursuance of law for failure to pay its annual license fee for two years is hereby authorized and permitted to apply to the Secretary of State for reinstatement at any time after its name has been stricken from the records of the office of the Secretary of State. Any corporation stricken from the records and dissolved, as provided in this chapter may at any time thereafter hold a meeting of stockholders, in the same manner as provided during its corporate existence, and pass such resolutions as may be necessary to close out its affairs and wind up the business of such corporation and where such stricken and dissolved corporation has heretofore held such meetings of stockholders for the purpose of passing resolutions to wind up their affairs, such method of procedure is hereby validated and approved. [Laws 1911, p. 135, § 1.]

§ 729. Penalties to be Paid for Reinstatement.

That section 3715b of Remington and Ballinger's Annotated Codes and Statutes of Washington be, and the same is hereby, amended to read as follows: Section 3715b. Any corporation so applying for reinstatement shall at the time of its application pay to the Secretary of State, for the use of the state, all license fees and penalties then due from it and the sum of one hundred dollars as additional penalty: Provided, that this shall apply to the reinstatement of corporations, the names of which shall have been stricken at the present time, and hereafter whenever any corporation shall have its name stricken from the records by the Secretary of State it shall, in applying for reinstatement, pay all license fees and penalties then due from it and the additional sum of twenty dollars

for each and every year that its name has been stricken from the records, and upon the making of such application and such payment, it shall be the duty of the Secretary of State to enter upon his records a notation that such corporation is reinstated. [Laws 1911, § 2, p. 135.]

§ 730. All Fees shall be Paid in Advance.

[§ 3718, Rem.–Bal.] All fees provided for in this act are due in advance and shall be paid to the Secretary of State before the services desired are performed. [Laws 1907, § 10, p. 274.]

§ 731. Corporation Charged with Crime.

Section 1. Whenever an indictment or information shall be filed in any superior court against a corporation charging it with the commission of a crime, a summons shall be issued by the clerk of such court, signed by one of the judges thereof, commanding the sheriff forthwith to notify the accused thereof, and commanding it to appear before such court at such time as shall be specified in said summons. Such summons and a copy of the indictment or information shall be at once delivered by such clerk to said sheriff and by him forthwith served and returned in the manner provided for service of summons upon such corporation in a civil action. Whenever a complaint against a corporation, charging it with the commission of a crime, shall be made before any justice of the peace or municipal judge, a like summons, signed by such justice of the peace or municipal judge, shall be issued, which, together with a copy of said complaint, shall be delivered to the sheriff at once and by him forthwith served as herein provided. [Laws 1911, § 1, p. 106.]

Sec. 2. Upon such service being made such corporation shall appear at the time designated, by one of its officers or by counsel; and upon such appearance, and thereafter, the same course shall be pursued, as nearly as may be, as upon the appearance of an individual to indictment, information or complaint and warrant charging him with the same offense. Upon failure of the corporation to make such appearance said court

shall cause to be entered a plea of "not guilty," and upon appearance made or plea entered the corporation shall be deemed forthwith continuously present in court until the case shall be finally disposed of. [Laws 1911, § 2, p. 107.]

Sec. 3. If the corporation shall be found guilty and a fine imposed, it shall be entered and docketed by the clerk, or justice of the peace or municipal judge as a judgment against the corporation, and it shall be of the same force and effect and be enforced against such corporation in the same manner as a judgment in a civil action. [Laws 1911, § 3, p. 107.]

CONSTITUTIONAL PROVISIONS.

§ 732. Not to be Created by Special Laws.

Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended, or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited, or restrained by law. [§ 1, Art. XII, State Const.]

A special charter is not repealed by a subsequent general incorporation act. (Cascades R. Co. v. Sohms, 1 Wash. Ter. 557.)

§ 733. Legislature shall not Extend Franchise or Remit Forfeiture.

The legislature shall not extend any franchise or charter, nor remit the forfeiture of any franchise or charter of any corporation now existing or which shall hereafter exist under the laws of this state. [§ 3, Art. XII, State Const.]

§ 734. Liability of Stockholders.

Each stockholder in all incorporated companies, except corporations organized for banking or insurance purposes, shall be liable for the debts of the corporation to the amount of his unpaid stock, and no more, and one or more stockholders may be joined as parties defendant in suits to recover upon his liability. [§ 4, Art. XII, State Const.]

Agreement by corporation not to engage in a particular business is inoperative against the stockholders of the company individually. (Murray v. O'Kanagan Livestock etc. Co., 12 Wash. 259, 40 Pac. 942.)

§ 735. Corporation Construed to Include What.

The term "corporations," as used in this article, shall be construed to include all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or partnerships, and all corporations shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons. [§ 5, Art. XII, State Const.]

§ 736. Corporation Stock, Fictitious Issue Void.

Corporations shall not issue stock, except to bona fide subscribers therefor; or their assignees; nor shall any corporation issue any bond, or other obligation, for the payment of money, except for money or property received or labor done. The stock of corporations shall not be increased, except in pursuance of a general law, nor shall any law authorize the increase of stock, without the consent of the person or persons holding the larger amount in value of the stock, nor without due notice of the proposed increase having been previously given in such manner as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void. [§ 6, Art. XII, State Const.]

Property may be taken in payment for a stock subscription. (Manhattan Trust Co. v. Seattle Coal & Iron Co., 16 Wash. 499, 48 Pac. 333, 737.)

Property taken in payment of stock must be fairly valued and stockholder's valuation is not conclusive. (Dunlap v. Rauch, 24 Wash. 620, 64 Pac. 807; Manhattan Trust Co. v. Seattle Coal & Iron Co., 19 Wash. 493, 53 Pac. 951.)

Where fully paid stock is issued for property, there must be actual fraud to enable creditors to call stockholders to account or for unpaid subscriptions. (Turner v. Bailey, 12 Wash. 634, 42 Pac. 115.)

Stock subscriptions must be fully paid in property or cash, irrespective of understandings among the stockholders. (Adamant Mfg. Co. v. Wallace, 16 Wash. 614, 48 Pac. 415.)

Where stock is fully paid by property at its fair valuation, the stockholders do not become subsequently liable by the subsequent depreciation of the property. (Turner v. Bailey, 12 Wash. 634, 42 Pac. 115.)

The fact that a stock certificate purports on its face to be fully paid is not conclusive. (Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089.)

Stock issued to promoters for property not canceled in absence of actual fraud. (Inland Nursery & Floral Co. v. Rice, 57 Wash. 67, 106 Pac. 499.)

§ 737. Foreign Corporations shall Conform to State Laws.

No corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state. [§ 7, Art. XII, State Const.]

§ 738. Leasing or Alienation of Franchises.

No corporation shall lease or alienate any franchise, so as to release the franchise, or property held thereunder, from the liabilities of the lessor, or grantor, lessee, or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges. [§ 8, Art. XII, State Const.]

Transfer of property for payment of debts not prevented by article 12, section 8, constitution, in alienation of corporate franchise. (Klosterman v. Mason County etc. R. Co., 8 Wash. 281, 36 Pac. 136.)

Rule that corporation may not assign its corporate privileges and franchises does not apply to franchises granted by city which come under section 1500, General Statutes. (Commercial Elec. L. & P. Co. v. Tacoma, 17 Wash. 661, 50 Pac. 592.)

§ 739. State shall not Loan Its Credit to Corporations.

The state shall not in any manner loan its credit, nor shall it subscribe to, or be interested in, the stock of any company, association or corporation. [§ 9, Art. XII, State Const.]

§ 740. Eminent Domain, State may Exercise Right Against Corporations.

The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals. [§ 10, Art. XII, State Const.]

§ 741. Liability of Stockholders.

No corporation, association, or individual shall issue or put in circulation as money anything but the lawful money of the United States. Each stockholder of any banking or insurance corporation or joint stock association shall be individually and personally liable, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation or association accruing while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares. [§ 11, Art. XII, State Const.]

The liability imposed by statute is secondary, as that of surety (Wilson v. Book, 13 Wash. 676, 43 Pac. 939; Watterson v. Masterson, 15 Wash. 511, 46 Pac. 1041), but this does not affect the time and manner of enforcement by suit (Bennett v. Thorne, 36 Wash. 253, 78 Pac. 936); the additional liability is personal. (Shuey v. Holmes, 21 Wash. 223, 57 Pac. 818; Shuey v. Adair, 24 Wash. 378, 64 Pac. 536.)

§ 742. Insolvent Banks shall not Receive Deposits.

Any president, director, manager, cashier, or other officer of any banking institution who shall receive or assent to the reception of deposits after he shall have knowledge of the fact that such banking institution is insolvent or in failing circumstances shall be individually responsible for such deposits so received. [§ 12, Art. XII, State Const.]

This section does not preclude criminal liability. (State v. Oleson, 35 Wash. 149, 76 Pac. 686.)

§ 743. Common Carriers—Rights—Duties.

All railroad, canal, and other transportation companies are declared to be common carriers and subject to legislative control. Any association or corporation organized for the purpose, under the laws of the state, shall have the right to connect at the state line with railroads of other states. Every railroad company shall have the right with its road, whether the same is now constructed or may hereafter be constructed, to intersect, cross, or connect with any other railroad, and when such railroads are of the same or similar gauge they shall, at all crossings and at all points where a railroad shall begin or terminate at or near any other railroad, form proper connections, so that the cars of any such railroad companies may be speedily transferred from one railroad to another. All railroad companies shall receive and transport each the other's passengers, tonnage, and cars, without delay or discrimination. [§ 13, Art. XII, State Const.]

Railways are common carriers. (Cogswell v. West St. & R. Co., 5 Wash. 46, 31 Pac. 411; Boyle v. Gt. North. R. Co., 13 Wash. 383, 43 Pac. 344; State ex rel. Grinsfelder v. Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719.)

An irrigation company is a common carrier. (Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635.)

An owner of an office building operating an elevator is a common carrier. (Edwards v. Burke, 36 Wash. 107, 78 Pac. 610.)

Right of railroad to cross another does not justify longitudinal taking. (Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551.)

Great necessity must be shown to justify condemnation of terminal grounds. (State ex rel. Spokane Falls & N. R. Co. v. Superior Court, 40 Wash. 389, 82 Pac. 417.)

§ 743a. Certain Combinations Forbidden.

No railroad company or other common carrier shall combine or make any contract with the owners of any vessel that leaves port or makes port in this state, or with any common carrier, by which combination or contract the earnings of one doing the carrying are to be shared by the other not doing the carrying. [§ 14, Art. XII, State Const.]

Construction by competing lines of new line opening new territory does not violate this section. (State ex rel. Cascade R. Co. v. Superior Court, 51 Wash. 346, 98 Pac. 739.)

§ 744. Discrimination in Rates Forbidden.

No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within the state, or coming or going to any other state. Persons and property transported over any railroad, or by any other transportation company, or individual, shall be delivered at any station, landing or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction to any more distant station, port or landing. Excursion and commutation tickets may be issued at special rates. [§ 15, Art. XII, State Const.]

This section is limited to construction of legislature in statute; not self-executing. (Northwestern Warehouse Co. v. Oregon R. & Nav. Co., 32 Wash. 218, 73 Pac. 388.)

§ 745. Shall not Consolidate.

No railroad corporation shall consolidate its stock, property or franchise with any other railroad corporation owning a competing line. [§ 16, Art. XII, State Const.]

§ 746. Rolling Stock, etc., Considered to be Personal Property.

The rolling stock and other movable property belonging to any railroad company or corporation in this state shall be considered personal property, and shall be liable to taxation and to execution and sale in the same manner as the personal property of individuals, and such property shall not be exempted from execution and sale. [§ 17, Art. XII, State Const.]

§ 747. Regulation of Fares and Freights by Legislature.

The legislature shall pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, and to correct abuses, and to prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads and other common carriers in the state, and shall enforce such laws by adequate penalties. A railroad and transportation commission may be established and its powers and duties fully defined by law. [§ 18, Art. XII, State Const.]

This section does not prevent the delegation of rate-making to a commission. (Great Northern R. Co. v. R. R. Commission, 52 Wash. 33, 100 Pac. 184.)

§ 748. Telegraph and Telephone Companies.

Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within this state, and said companies shall receive and transmit each other's messages without delay or discrimination, and all such companies are hereby declared to be common carriers and subject to legislative control. Railroad corporations organized or doing business in this state shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights of way of such railroads and railroad companies, and no railroad corporation organized or doing business in this state shall allow any telegraph corporation or company any facilities, privileges, or rates for transportation of men or material, or for repairing their lines, not allowed to all telegraph com-

panies. The right of eminent domain is hereby extended to all telegraph and telephone companies. The legislature shall, by general law, of uniform operation, provide reasonable regulations to give effect to this section. [§ 19, Art. XII, State Const.]

Not self-executing. City may decline to grant franchise. (State ex rel. Spokane etc. Tel. Co. v. Spokane, 24 Wash. 53, 63 Pac. 1116.)

§ 749. Free Passes—Discrimination Forbidden.

No railroad or other transportation company shall grant free passes, or sell tickets or passes at a discount, other than as sold to the public generally, to any member of the legislature, or to any person holding any public office within this state. The legislature shall pass laws to carry this provision into effect. [§ 20, Art. XII, State Const.]

A public officer traveling on pass estopped from setting up its invalidity. (Muldoon v. Seattle City Ry. Co., 10 Wash. 311, 38 Pac. 995.)

§ 750. Railroads shall not Discriminate Against Any Express Company.

Railroad companies now or hereafter organized or doing business in this state, shall allow all express companies organized or doing business in this state, transportation over all lines of railroad owned or operated by such railroad companies upon equal terms with any other express company, and no railroad corporation organized or doing business in this state shall allow any express corporation or company any facilities, privileges, or rates for transportation of men or materials or property carried by them, or for doing the business of such express companies, not allowed to all express companies. [§ 21, Art. XII, State Const.]

§ 751. Trusts and Monopolies Forbidden.

Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership, or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trus-

tees or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever, for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise. [§ 22, Art. XII, State Const.]

Street railway franchise permitting consolidation of competing lines does not violate this section. (Wood v. Seattle, 23 Wash. 1, 62 Pac. 135.)

Held, monopoly in warehouse business not shown. (Northwest Warehouse Co. v. Oregon R. & N. Co., 32 Wash. 218, 73 Pac. 388.)

Section 8100, Remington and Ballinger's Code, providing for excavation of waterways, does not violate this section. (Seattle & Lake Wash. Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 Pac. 845.)

Boom company. (Nicomen Boom Co. v. North Shore etc. Co., 40 Wash. 315, 82 Pac. 412.)

CROSS-REFERENCES

TO

Rem.-Bal. Code and Secretary of State's Compilation.

Rem.-Bal.	Secretary of State.	McIntire.
921	63	463
922	64	464
923	—	464a
924	65	465
925	66	466
926	67	467
927	68	468
928	—	468a
929	69	469
930	70	470
931	71	471
932	72	472
933	73	473
934	87	487
935	88	488
936	89	489
1700	298	698
1701	299	699
1702	300	700
1703	301	701
1704	302	702
1705	303	703
1706	304	704
1707	305	705
2638	39	439
2639	40	440
2640	41	441
2641	42	442
2642	43	443
2643	44	444
2644	45	445

Rem.–Bal.	Secretary of State.	McIntire.
2645	46	446
2646	47	447
2647	48	448
2648	49	449
2649	50	450
3290	205	605
3291	206	606
3292	207	607
3293	208	608
3294	209	609
3295	238	638
3296	239	639
3297	240	640
3298	241	641
3299	242	642
3300	243	643
3301	244	644
3302	245	645
3303	246	646
3304	247	647
3305	248	648
3306	249	649
3307	250	650
3308	251	651
3309	252	652
3310	253	653
3311	254	654
3313	255	655
3314	256	656
3315	210	610
3316	211	611
3317	212	612
3318	213	613
3319	214	614
3320	215	615
3321	216	616
3322	217	617
3323	218	618
3324	219	619

Rem.–Bal.	Secretary of State.	McIntire.
3325	220	620
3326	221	621
3327	222	622
3328	223	623
3329	224	624
3330	225	625
3331	226	626
3332	227	627
3333	228	628
3334	229	629
3335	230	630
3336	231	631
3337	232	632
3338	233	633
3339	234	634
3340	—	634a
3341	235	635
3342	236	636
3343	237	637
3344	261	661
3345	262	662
3346	188	588
3347	189	589
3348	190	590
3349	191	591
3350	192	592
3351	193	593
3352	194	594
3353	195	595
3354	196	596
3355	197	597
3356	198	598
3357	199	599
3358	200	600
3359	201	601
3360	202	602
3361	203	603
3362	204	604
3363	—	602a

Rem.–Bal.	Secretary of State.	McIntire.
3364	——	603a
3365	259	659
3366	260	660
3367	257	657
3368	258	658
3602	151	574
3603	152	551
3604	153	557
3605	154	560
3606	155	558
3607	156	559
3608	157	558, 572
3614	163	570
3618	167	567
3620	169	569
3623	172	571
3626	175	555
3627	176	556, 565
3631	180	564
3633	182	575
3634	183	566
3643	306	706
3644	307	707
3645	308	708
3646	309	709
3647	310	710
3649	311	711
3650	313	713
3651	312	712
3677	1	401
3678	31	431
3679	2	402
3680	37	437
3681	30	430
3682	5	405
3683	6	406
3684	8	408
3685	35	435

Rem.-Bal.	Secretary of State.	McIntire.
3686	7	407
3687	9	409
3688	10	410
3689	12	412
3690	11	411
3691	3	403
3692	4	404
3693	13	413
3694	14	414
3695	15	415
3696	16	416
3697	17	417
3698	18	418
3699	36	436
3700	19	419
3701	20	420
3702	21	421
3703	38	438
3704	24	424
3705	25	425
3706	26	426
3707	27	427
3708	28	428
3708½	29	429
3709	314	714
3710	315	715
3711	316	716
3712	317	717
3713	318	718
3714	319	719
3715	320	720
3715a	321	721
3715b	322	722
3715c	323	723
3715d	324	724
3715e	325	725
3716	326	726
3717	327	727
3718	330	730

Rem.–Bal.	Secretary of State.	McIntire.
3720	52	452
3721	53	453
3722	54	454
3723	55	455
3724	56	456
3725	57	457
3726	58	458
3727	59	459
3728	——	459a
3729	60	460
3730	61	461
3731	277	677
3732	278	678
3733	279	679
3734	280	680
3735	281	681
3736	282	682
3737	283	683
3738	284	684
3739	285	685
3740	286	686
3741	287	687
3742	288	688
3743	289	689
3744	290	690
3745	291	691
3746	292	692
3747	293	693
3748	294	694
3749	295	695
3750	296	696
3751	297	697
3752	263	663
3753	264	664
3754	265	665
3755	266	666
3756	267	667
3757	268	668
3758	269	669

Rem.-Bal.	Secretary of State.	McIntire.
3759	270	670
3760	271	671
3761	272	672
3762	273	673
3763	274	674
3764	275	675
3765	147	547
3766	148	548
3766a	149	549
4972	107	507
4973	108	508
4974	95	495
4975	96	496
4976	97	497
7106	142	542
7107	143	543
7108	144	544
7109	145	545
7110	125	525
7111	126	526
7112	127	527
7113	128	528
7114	129	529
7115	130	530
7116	131	531
7117	132	532
7118	133	533
7119	134	534
7120	135	535
7121	136	536
7122	137	537
7123	138	538
7124	139	539
7125	140	540
7126	141	541
7344	81	481
7345	82	482
7346	83	483
7347	34	434

Rem.–Bal.	Secretary of State.	McIntire.
7348	22	422
7349	23	423
7350	—	423a
8662	98	498
8663	105	505
8664	106	506
8665	99	499
8666	100	500
8667	102	502
8668	101	501
8669	103	503
8670	104	504
8671	—	504a
8736	76	476
8737	77	477
8738	—	477a
8739	74	474
8740	75	475
8761½	51	451
9080	111	511
9081	112	512
9082	113	513
9083	85	485
9300	78	478
9300	114	514
9301	79	479
9301	115	515
9302	116	516
9303	117	517
9304	80	480
9305	118	518
9314	119	519
9315	120	520
9316	121	521
9317	122	522
9318	123	523
9319	124	524
9504	32	432
9505	33	433

Rem.-Bal.	Secretary of State.	McIntire.
9506	90	490
9507	91	491
9508	92	492
9509	62	462
9510	93	493

FEDERAL CORPORATION TAX LAW.

§ 752. Special Excise Tax on Corporations.

Act Aug. 5, 1909, c. 6, § 38. (H. R. 1438.)

Sec. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: Provided, however, That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of

such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

§ 753. Income and Tax, How Returned.

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or

insurance companies, subject to the tax hereby imposed: Provided, That in the case of a corporation, joint stock company or association, or insurance company organized under the laws of a foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, (first) all the ordinary and necessary expenses actually paid within the year out of earnings in the maintenance and operation of its business and property within the United States and its Territories, Alaska, and the District of Columbia, including all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year in business conducted by it within the United States or its Territories, Alaska, or the District of Columbia not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds: (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness, not exceeding the proportion of its paid-up capital stock outstanding at the close of the year which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia bears to the gross amount of its income derived from all sources within and without the United States; (fourth) the sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, and insurance companies, subject to the tax hereby imposed. In the case of assessment insurance companies the actual de-

posit of sums with State or Territorial officers, pursuant to law, as additions to guaranty or reserved funds shall be treated as being payments required by law to reserve funds.

§ 754. Deduction from Income.

Third. There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies, ascertained as provided in the foregoing paragraphs of this section, the sum of five thousand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year ending December thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, joint stock companies or associations, and insurance companies, subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or, in the case of a corporation, joint stock company or association or insurance company organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth, (first) the total amount of the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation, joint stock company or association, or insurance company at the close of the year; (third) the gross amount of the income of such corporation, joint stock company or association, or insurance company, received during such year

from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska and the District of Columbia; also the amount received by such corporation, joint stock company or association, or insurance company, within the year by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such corporation, joint stock company or association, or insurance company, within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, and if organized under the laws of a foreign country the amount so paid in the maintenance and operation of its business within the United States and its Territories, Alaska, and the District of Columbia; (fifth) the total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; and in the case of a corporation, joint stock company or association or insurance company, organized under the laws of a foreign country, all losses actually sustained by it during the year in business conducted by it within the United States or its Territories, Alaska, and the District of Columbia, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve fund; (sixth) the amount of interest actually paid

within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, stating separately all interest paid by it within the year on deposits; or in case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed under the authority of the United States or any State or Territory thereof, and separately the amount so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or association, or insurance company, after making the deductions in this section authorized. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue.

§ 755. False Returns and Examinations.

Fourth. Whenever evidence shall be produced before the Commissioner of Internal Revenue which in the opinion of the commissioner justifies the belief that the return made by any corporation, joint stock company or association, or insurance company, is incorrect, or whenever any collector shall report to the Commissioner of Internal Revenue that any corporation, joint stock company or association, or insurance company, has failed to make a return as required by law, the Commissioner of Internal Revenue may require from

the corporation, joint stock company or association, or insurance company making such return, such further information with reference to its capital, income, losses, and expenditures as he may deem expedient; and the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of such return or for the purpose of making a return where none has been made, is hereby authorized, by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matters required to be included in the return of such corporation, joint stock company or association, or insurance company, and to require the attendance of any officer or employee of such corporation, joint stock company or association, or insurance company, and to take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons; and the Commissioner of Internal Revenue may also invoke the aid of any court of the United States having jurisdiction to require the attendance of such officers or employees and the production of such books and papers. Upon the information so acquired the Commissioner of Internal Revenue may amend any returns or make a return where none has been made. All proceedings taken by the Commissioner of Internal Revenue under the provisions of this section shall be subject to the approval of the Secretary of the Treasury.

§ 756. Assessments.

Fifth. All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon; and in the case of any return made with false or fraudulent intent, he shall add one hundred per centum of such tax, and in case of a refusal or neglect to make a return or to verify the same as aforesaid he shall add fifty per centum of such tax. In case of neglect occasioned by the sickness or absence of an officer of such corporation, joint stock company or association, or insurance company, required to make said return, or for other sufficient reason, the collector may allow

such further time for making and delivering such return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax originally assessed unless the refusal, neglect, or falsity is discovered after the date for payment of said taxes, in which case the amount so added shall be paid by the delinquent corporation, joint stock company or association, or insurance company, immediately upon notice given by the collector. All assessments shall be made and the several corporations, joint stock companies or associations or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessment shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such returns, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as above provided for and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint stock company or association, or insurance company immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due.

§ 757. Filing of Assessment Returns.

Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

§ 758. Information not to be Disclosed.

Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court.

§ 759. Penalty for False Return or Refusal to Make.

Eighth. If any of the corporations, joint stock companies or associations, or insurance companies, aforesaid, shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint stock company or association, or insurance company, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars.

Any person authorized by law to make, render, sign, or verify any return, who makes any false or fraudulent return, or statement, with intent to defeat or evade the assessment required by this section to be made, shall be guilty of a misdemeanor, and shall be fined not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, at the discretion of the court, with the cost of prosecution.

All laws relating to the collection, remission, and refund of internal revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section.

Jurisdiction is hereby conferred upon the circuit and district courts of the United States for the district within which any person summoned under this section to appear to testify

or to produce books, as aforesaid, shall reside, to compel such attendance, production of books, and testimony by appropriate process.

Note: The Federal Corporation Tax Law was enacted as section 38 of the Payne Tariff Act of 1909. This act applies to all corporations not specifically exempted and has been construed by the United States supreme court in Flint v. Stone Tracy Co., 220 U. S. 107, to be constitutional and not to be a franchise or income tax, but an excise tax on doing "corporate business."

The tax is imposed on all corporations and joint stock companies and associations doing business in a corporate or quasi-corporate capacity under statutory authority. (Eliot v. Freeman et al., 220 U. S. 178.)

The measure of the tax is the income (subject to specified deductions) "from all sources," which means not only income from the property used in business but income from every source. (Flint v. Stone Tracy Co., 220 U. S. 107.)

Receivers of insolvent corporations should make the required return whether there be liability to pay the tax or not. (Pennsylvania etc. Co. v. New York City R. Co., 176 Fed. 471.)

The Interstate Commerce Act of 1887 as amended, United States Compiled Statutes 1901, vol. 3, p. 3154, and as amended by the Act of 1906–10, U. S. Compiled Statutes, Supplement of 1911, p. 1284, and The Sherman Anti-Trust Act, so called, entitled "Monopolies and Combinations in Restraint of Trade," as passed in 1890 and amended in 1894, U. S. Compiled Statutes 1901, vol. 3, p. 3200, and as amended in 1903, U. S. Compiled Statutes, Supplement 1911, p. 1318, and in 1910, U. S. Compiled Statutes, Supplement 1911, p. 1382, should be consulted by corporations doing interstate business.

OUTLINE

OF

CORPORATE PROCEDURE.

§ 760. Character of Corporate Existence.

A corporation is a union of individuals acting under a corporate name as a unit, authorized and recognized as such by statute law. It is devised and created by the law not for its own sake or benefit, but purely to facilitate action on the part of individuals composing its membership. The statute brings it into being, regulates its conduct and terminates its existence. The formation and conduct of corporations is therefore almost invariably a matter of compliance with statutory requirements governing the case in hand, and statutory provisions, though many times inconsistent and incomplete, often uncertain and ambiguous, and sometimes unreasonable, can only be modified or improved by the legislature or other law-making power. In the concrete case the statute must be taken as it is and complied with in its express terms, so far as possible. One should not do more and must not do less than the statute requires. In the case of the corporation, strict compliance with the statute is of imperative importance, and failure therein often leads to endless confusion, loss, and perhaps financial ruin of individuals concerned. In the preparation, therefore, of papers and documents for use in the formation and conduct of corporations, the aim must be persistent toward the utmost simplicity, clearness and precise compliance with the statutory requirements possible to attain.

§ 761. The Several Kinds of Corporations.

Of private corporations, or those composed of persons expressly assenting to membership therein, the statutory Corporation Laws of Washington provide by sections 401 and 402 thereof for the formation of all kinds of trading and business

stock corporations for profit, including railroads, but not including those otherwise expressly provided for, to wit: Building and loan associations, by section 550; trust companies, by section 588; banks, by section 612; patrons of husbandry (Granges), by section 547; co-operative associations, by section 546.

Private corporations not for profit are authorized to be formed as follows: Membership, or nonstock, corporations of all kinds not otherwise expressly provided for, by sections 663–667. Those otherwise provided for are religious, educational and charitable, for a college, seminary, church, library, benevolent, temperance, charitable or scientific society, by section 677; secret societies, lodges, orders, by section 679; social clubs and any educational, charitable or religious purpose, by sections 686, 687; cemetery associations, by section 706.

§ 762. Preliminary Considerations.

Preliminary to taking the first steps for the formation of a company and the preparation of the articles of incorporation, the following rules and requirements are to be considered and borne in mind:

Corporations may subscribe for, hold, own and vote stock in other corporations. (Section 408.)

Corporate names are not to be duplicated (section 437); therefore, it should be ascertained from the Secretary of State, as early as conveniently may be, whether a desired name may be used.

The whole capital stock of the company must be subscribed before it begins business, unless its business is to be confined to loaning money on real estate. (Section 401.)

Subscriptions to stock may be paid in cash or property, as provided by the stockholders or trustees in absence of fraud. (Section 414.)

Preferred stock is not specifically provided for by statute, but may be authorized at the outset by the by-laws or otherwise by the trustees; i. e., before any subscriptions to the common stock are taken without notice to such subscriber. (Sections 407, 417.)

The liability of stockholders is by the Constitution limited to unpaid subscriptions. (Const., sec. 734.)

The capital stock of the company may be increased or decreased at any time by complying with sections 424, 425, 426.

The trustees must be stockholders (section 407) and the trustees for the first six months or less are named in the articles. (Section 402.) They must take an oath before entering on their duties. (Section 407.)

Meetings of stockholders must be held at the principal place of business in the state. (Section 411.)

Meetings of trustees are to be held at such places within or without the state as may be designated by the articles or by-laws. (Section 411.)

Stockholders may expel trustees and elect others in their place; otherwise vacancies are filled by the board. (Section 407.)

By-laws are adopted and amended by the trustees. (Sections, 406, 407.)

Annual reports are not required of business corporations.

Every stock corporation, domestic or foreign, must pay an annual license fee of $15 (section 719), and cannot maintain suit unless the license fee is paid. (Section 720.)

Fees are as follows: For filing articles, $25 (section 714); for amendatory or supplemental articles, certificates of increase or decrease of capital stock, $10 (section 715); for appointment or revocation of appointment of agent by foreign corporation, $5 (section 716); certified copies, $5 (section 717); recording fees (section 718).

§ 763. Articles of Incorporation.

All stock corporations for profit, trade or business other than those having for some or all of their objects banking, insurance, trust company business, or the rights and powers of building and loan associations are formed under sections 401 and 402, corporation laws.

Articles must be made and executed in compliance with the requirements of those sections in triplicate, one to be filed in the office of the Secretary of State, one in the office of the county auditor, and one in the company's files. (Section 402.)

In view of the fact that stock corporations for profit formed under sections 401 and 402 are by section 406, subdivision 7, confined in their exercise of corporate powers within the objects and purposes of the company expressed in their articles of incorporation, it is important in stating the objects and purposes in the articles to describe the business to be conducted by apt and specific wording covering all emergencies that may arise during the corporate existence. A form for a building company complete with names and data and executed as if ready for filing will be found post (section 797), and subjoined thereto are purpose clauses for various kinds of business corporations.

As soon as may be after the corporate name, the amount of the capital stock, the par value of the shares and the preferences, if any, i. e., whether the stock is to be all common or part preferred, have been determined upon by the parties in interest as later to be adopted by the by-laws, the corporate seal, stock certificate book, and stock transfer or record book, should be ordered from the stationers, in order that they may be ready when required for the first meeting of trustees.

§ 764. First Meeting of Trustees.

As soon as conveniently may be after the articles have been made, executed and filed, and before the trustees named in the certificate do any corporate act, they should take and subscribe to an oath as required by section 407. A form of oath will be found in section 800.

Thereafter one of the trustees should deliver, personally, to each of the other trustees a notice in writing of such first meeting setting forth the time and place in compliance with section 412. If for any reason it is impossible to deliver the notice to any of the trustees, it may be published as provided in that section. A form of written notice for the purpose will be found in section 799. At the time and place set in the notice the first meeting of the trustees named in the certificate should be held and the organization of the company completed, officers elected, stock certificates, by-laws and corporate seal formally adopted, and before any corporate business is commenced subscriptions to the entire capital stock should be

received. A form of minutes for the first meeting of the trustees will be found in section 798. While it is unnecessary to follow any particular form of procedure or minutes, it is important to spread in some shape on minutes or records of the company proof of compliance with statutory requirements.

§ 765. Subscriptions.

Subscriptions are contracts binding on each subscriber until the par value of stock subscribed by him is fully paid in cash or property. In case, however, that stock is issued before it is fully paid and afterward transferred on the books of the company, the transferee becomes liable instead of the original subscriber for the amounts still due and unpaid on the stock. No particular form of subscription agreement must necessarily be followed, it being enough if the subscriber expressly agrees to take certain shares of stock. A form of stock subscription should be used, however, clearly defining the rights and liabilities of the subscriber to avoid question and possible litigation. Such a form will be found in section 803.

§ 766. Preferred Stock.

Preferred stock is stock entitled to preference over common stock in the payment of any dividends declared and in the distribution of assets on dissolution. Preferred stock, for the reason that it is preferred over common stock, must be issued, if at all, with the assent, express or implied, of every subscriber to the common stock. Preferred stock, if issued, should therefore be authorized at the outset and brought to the actual notice of every subscriber to the common stock. There are various kinds of preferred stock, the particular preference adopted in the concrete case being a matter of business advisability under the circumstances. The kind or form of preference having been selected, it should be adopted by the trustees and set out in the by-laws, and the preferential right should be set forth in a manner sufficient to give notice of its existence in the stock certificates and subscription agreements. A form for cumulative preferred stock preference

in the by-laws will be found in section 801, article VIII, and a corresponding form of stock certificate in section 802.

§ 767. By-laws.

By-laws are authorized to be made by the statutory grant of powers to the corporation (section 406, subdivision 6), and since the powers of the corporation are to be exercised by the trustees (section 407), the power to make by-laws is consequently in the trustees.

By-laws as rules adopted to govern the procedure of assemblies of individuals are of very ancient origin. In corporations, they govern the manner of the exercise of the corporate powers and the respective rights, duties and liabilities of the stockholders, trustees and officers of the corporation. Once adopted they have the force of law, binding on all persons having actual or constructive notice of them, and cannot be modified or repealed except in accordance with statutory provision or the rule prescribed in themselves for their amendment, alteration or repeal. It is therefore important, in order to make the by-laws adopted in any particular case elastic and easily modified or, on the other hand, to make them rigid and inelastic, if so desired, to include or exclude a provision for their amendment or repeal. Where it is considered desirable, as is usually the case, to make the by-laws readily adaptable to changing circumstances, the provision for amendment, alteration or repeal is included, thus taking the by-laws out of the category of rigid contractual rules and enabling the trustees at any meeting to alter, amend or repeal them. A workable form of by-laws devised by experience to prevent deadlocks and to facilitate corporate action will be found as adopted in the form of minutes for the first meeting of trustees in section 801. This form of by-laws should, of course, be modified or abridged where necessary or desirable, to meet the requirements of a particular case.

§ 768. Issue of Stock for Property.

Since by section 414 the times, manner and amounts of payments of subscriptions to stock are to be determined by the stockholders or trustees, property may be accepted in payment

of subscriptions and stock issued therefor fully paid in the absence of fraud.

While the issue of stock fully paid for property is notoriously often utilized for the purpose of evading the statutory liability of stockholders for unpaid subscriptions and in covering watered stock issues, it is none the less frequently made use of for the legitimate purpose contemplated by the statute, namely, to enable persons incorporating their business or other concerns to turn over their property to the corporation and to take stock therefor fully paid to the amount of the fair valuation of the property. If, whatever the pretense, the property turned over to the corporation for stock is in fact intentionally and excessively overvalued, no device, however clever, can alter the actual fact or do more than cover the attempted evasion of the statute. The value of property, however, is in any event a matter of opinion purely, and whatever the difference of opinion and however great may be the fluctuation from time to time in the valuation placed by different persons upon the property, if, nevertheless, at the time stock is issued for property the valuation placed upon the property can be shown for reasons stated to be a fair one and fairly made, and especially if made by persons not directly interested in putting an overvaluation on the property, stock issued for property thus valued will stand as fully paid, and its issue as fully paid stock will not be successfully questioned.

Where stock is issued for property, therefore not only should the property be fairly valued, but the minutes and records of the company should show that to be the case, and care especially should be taken that none of the trustees, whose function it may be to pass on the valuation of the property, is an owner of or otherwise directly interested in the property valued. Procedure in such cases is indicated in the form for minutes of first meeting of trustees in sections 798 and 805.

§ 769. List of Officers.

After the first meeting of trustees and the election of officers, and within thirty days after the filing of the articles,

the company must make and file with the county auditor, in compliance with section 404, a list of officers, with their titles, names, addresses and terms of office. A form will be found in section 806.

§ 770. Meetings of Trustees.

The trustees may and should meet from time to time as designated in the by-laws and otherwise, and exercise the corporate powsrs of the company as authorized by sections 406 and 407 and by the articles and in the manner provided by the by-laws.

In case a trustee is unable to attend any meeting, proof that notice of the meeting was duly given him or that he waived the same should be filed with the records of the company and spread on the minutes of such meeting. For form of notice and waiver, see sections 799 and 819.

§ 771. Records and Papers.

It is the duty of trustees, in compliance with section 420, to keep a record book of stockholders, alphabetically arranged, showing the names of stockholders, the number of shares owned, and the times of transfer, to keep the record open for inspection by stockholders and creditors, to allow extracts to be made, and to furnish certified copies of corporate papers on file.

§ 772. Assessments on Stock Subscriptions and Sale of Shares.

So long as any part of the stock subscriptions remains unpaid, the trustees may, under section 414 and in compliance with the by-laws, make assessments calling for all or part of the balance due by giving notice of such assessment to the stockholders personally, or by publication of the notice for four weeks in a newspaper published in the county of the principal place of business of the company, and in default of payment by the stockholder his shares may be sold at public auction, in compliance with the section. A form of notice of assessment for personal service or publication will be found in section 821.

§ 773. Change of Name.

If at any time it be found advisable to change the corporate name of the company, the trustees may by resolution authorize supplemental articles of incorporation to be filed for that purpose, in compliance with section 430, and upon executing such articles and filing the same in the office of the Secretary of State and in the office of the county auditor with the notice of such change as required by section 430, the corporate name will be changed accordingly. For form of supplemental articles and notice, see sections 807, 808.

§ 774. Change or Removal of Place of Business.

If it is desired to move the principal place of business of the company from one place to another in the same county, the removal should be authorized by a resolution of the trustees, and a removal notice published four weeks in a newspaper published nearest the old place of business, in compliance with section 429. If the principal place of business is to be moved into another county in the state, in addition to the resolution of the trustees and the publication of notice, a certified copy of the certificate of incorporation must be filed in the office of the county auditor of the county in which the principal place of business is to be in the future. For form of notice, see section 820.

§ 775. Stockholders' Meetings.

Annual and special meetings of the stockholders are held at the principal place of business of the company (section 411), upon such notice as shall be directed by the by-laws of the company (section 407) ; the annual meeting is held at the time designated in the by-laws for the election of trustees, and at both annual and special meetings each stockholder is entitled to cast as many votes in person or by proxy as there are shares of stock standing in his name on the books of the company, unless otherwise provided by the by-laws. Notice of the annual meeting is given as required by the by-laws of the company. See form in section 817.

Notice of special meetings is given as required by the by-laws, and any statutory requirement applicable to the

particular case. For form of notice for special meeting of stockholders, see section 809.

§ 776. Increase or Decrease of Capital Stock.

Whenever a corporation desires to increase or decrease its capital stock to an amount not less than its debts and liabilities, it may do so by a vote of two-thirds of its shares of stock taken at a special meeting called by a notice published for eight weeks in a newspaper of the county, and by filing in the office of the Secretary of State and in the office of the county auditor a certificate executed and verified by the chairman and secretary of the meeting and certified to by a majority of the trustees showing a compliance with the statutory provisions (sections 424, 425, 426).

A form of such certificate, including the notice of meeting, will be found in section 809.

§ 777. Dissolution.

Corporations are terminated in one of three ways: by the expiration of the term of existence stated in the charter, by forfeiture of the charter, and by voluntary dissolution.

In the case, however, of corporations failing to pay their license fee, provision is made by statute (sections 720, 724) for the involuntary dissolution of such corporations by the Secretary of State. In case a corporation desires voluntarily to dissolve itself, it may, with the consent of two-thirds of the stockholders given by vote at a special meeting called for the purpose, present a petition to that effect to the superior judge of the county in which it has its office, and on compliance in that and other respects with section 428 it may be dissolved, in which case the trustees at the time continue as trustees for the stockholders and creditors (section 427) to collect and pay outstanding debts, settle all its affairs, and divide among the stockholders the remaining money and property. A form of petition and certificate for voluntary dissolution in compliance with section 428 will be found in section 822.

§ 778. Foreign Corporations.

A foreign corporation in Washington is one organized under the laws of some jurisdiction other than the state of Washington. Foreign corporations on complying with the statute may do business, sue and be sued to the same extent as domestic corporations (section 452). A corporation, the majority of whose capital stock is owned by aliens, may not acquire ownership of lands other than mineral lands (section 452). A foreign corporation cannot conduct a real estate brokerage business in the state (section 452).

To comply with the statute, a foreign corporation must file in the office of the Secretary of State a certified copy of its certificate of incorporation (section 453), also written appointment of agent (section 454), and must pay an annual license fee (section 719). A form for written appointment of agent will be found in section 811.

VARIOUS PURPOSE CLAUSES.

§ 779. Advertising.

To prepare and arrange advertisements; to make, build, manufacture and construct advertising devices and novelties; to erect, construct, purchase, lease, hold, sell or otherwise acquire and dispose of fences, billboards, signboards, buildings, papers, publications and other structures and spaces suitable or desired for advertising purposes; to conduct a general advertising business as principals and agents; to carry on the business of printers, publishers, painters and decorators; to acquire, hold and dispose of inventions, patents and trademarks in the United States or foreign countries; to acquire, hold and dispose of real and personal property; to carry on said business as principal or agent within and without the state of Washington, and to carry on any business, make contracts and do any and all acts necessary, proper, incidental or convenient to said purposes and objects not inconsistent with the laws of Washington.

§ 780. Automobiles and Vehicles.

To make, manufacture and sell any and all kinds of motors, engines, machines, machinery and contrivances for the generation of steam, electricity, gasoline or other forms of power now known or which may be hereafter discovered; to make, manufacture and sell cars, carriages, wagons, boats, aeroplanes, balloons and vehicles of every kind and description for the transportation of passengers and goods by land, water or through the air; to manufacture, acquire, hold, sell and otherwise dispose of machinery, machine supplies and engineering appliances of all kinds; to acquire, hold and dispose of inventions, patents and trademarks in the United States and foreign countries; to acquire, hold and dispose of any and all kinds of real and personal property; to conduct said business as principal or agent within and without the state of Washington, and to carry on any business, make contracts and do any and all acts necessary, proper, incidental or con-

venient to said purposes and objects not inconsistent with the laws of Washington.

§ 781. Brewery.

To grow, cure, manufacture, prepare or otherwise acquire, hold, sell, or otherwise dispose of malt and hops; to manufacture, brew and bottle all kinds of ale, beer, porter and other beverages, and in general to manufacture, purchase, sell and deal in malt and hops and the products thereof; to acquire, hold and dispose of inventions, patents and trademarks in the United States or foreign countries; to acquire, hold and dispose of any and all kinds of real and personal property; to conduct said business as principal or agent within and without the state of Washington, and to carry on any business, make contracts, and do any and all acts necessary, proper, incidental or convenient to said purposes and objects not inconsistent with the laws of Washington.

§ 782. Bricks.

To make, manufacture, purchase, or otherwise acquire, hold and sell bricks, tiles, pipes, pottery, earthenware, china, terra-cotta and ceramic ware, and to buy, sell, deal and trade in every kind of bricks, stone and building materials, goods and merchandise by land and water; to acquire, hold and dispose of quarries, clay, sand and gravel banks and deposits, cars, boats and vehicles of all kinds; to acquire, hold and dispose of inventions, patents and trademarks in the United States and foreign countries; to acquire, hold and dispose of real and personal property of all kinds; to conduct said business as principal or agent within and without the state of Washington, and to carry on any business, make contracts and do any and all acts necessary, proper, incidental or convenient to said purposes and objects not inconsistent with the laws of Washington.

§ 783. Cattle.

To rear, grow, breed, buy or otherwise acquire, hold, sell or otherwise dispose of any and all kinds of cattle and livestock, meats, goods, wares and merchandise pertaining and belong-

ing to the cattle, livestock, meat and butcher business; to build or otherwise acquire, hold, maintain, sell or otherwise dispose of abattoirs for the slaughter and killing of all kinds of animals and cattle; to cure, can, preserve, manufacture and otherwise prepare all kinds of provisions, articles and merchandise for food or other use made of meats and fat and any and all kinds of goods kindred to the meat and butcher business, and to prepare in any and every manner the carcasses of animals and cattle into merchandise for the butcher and meat business; to acquire, hold and dispose of inventions, patents and trademarks in the United States or foreign countries; to acquire, hold and dispose of any and all kinds of real and personal property; to conduct said business as principal or agent within and without the state of Washington, and to carry on any business, make contracts and do any and all acts necessary, proper, incidental or convenient to said purposes and objects not inconsistent with the laws of Washington.

§ 784. Commission Merchants.

To manufacture, produce, purchase or otherwise acquire, own, hold, sell or otherwise dispose, as principal or as agent, upon commission or otherwise, within and without the state of Washington, any and all kinds of personal property, and in general to do a commission merchant's and selling agent's business; to acquire, hold and dispose of inventions, patents and trademarks in the United States or foreign countries; to acquire, hold and dispose of all kinds of real and personal property, and to carry on any business, make contracts and do any and all acts necessary, proper, incidental or convenient to said business not inconsistent with the laws of Washington.

§ 785. Distillers.

To manufacture, produce, distill, redistill and rectify wines, gins, whiskies, brandies, rum, beer, ale, and porter, and the by-products thereof, and to purchase, acquire, hold, sell and otherwise deal in and dispose of said products throughout the

United States and elsewhere; to acquire, hold and dispose of inventions, patents and trademarks in the United States and elsewhere; to acquire, hold and dispose of any and all kinds of real and personal property; to carry on said business, as principal or agent, within and without the state of Washington; to make contracts and to do any and all acts necessary, proper, incidental or convenient to said purposes and objects not inconsistent with the laws of Washington.

§ 786. Dock and Warehouse.

To receive, load, unload, transfer, store in warehouse or otherwise, to hoist, elevate and forward by wagon, car, barge, boat or other vehicle, on land or water, any and all kinds of goods, wares, merchandise, commercial commodity or thing of value; to erect, construct, purchase or otherwise acquire, maintain, hold, sell and otherwise dispose of docks, wharves, warehouses, terminal and transfer structures and other facilities, including piers, basins, floating docks, bulkheads, elevators, coal bins, pockets and chutes, and in general to carry on the business of docking, warehousing, storage and wharfage, freighting, elevating, forwarding, lighterage, storing and berthing of ships, steam vessels, boats and every other kind of water craft; to issue storage, dock and warehouse receipts, negotiable and non-negotiable, for and upon all kinds of goods, wares, merchandise and any other commercial commodity or thing of value; to purchase or otherwise acquire, hold, sell or otherwise dispose of ships, steamers, vessels and every kind of water craft, and all goods, wares, merchandise, commodity or thing of value; to make, manufacture or otherwise acquire, hold, sell or otherwise dispose of engines, boilers, launches, boats, water crafts of all kinds, and any article or thing of value; to collect and receive dockage, wharfage and storage dues and other compensation; to loan money on the pledge of goods, wares, merchandise and other property or of storage, dock or warehouse receipts therefor; and to advance moneys for freights, duties, fire and marine insurance, and liens of every description upon the pledge of goods, wares and merchandise or other property received on storage or

for the purpose of being warehoused or forwarded or on the pledge of storage, dock or warehouse receipts therefor; to acquire, hold and dispose of inventions, patents and trademarks in the United States or foreign countries; to acquire, hold and dispose of all, any and all kinds of real and personal property; to conduct said business as principal or agent, within and without the state of Washington, and to carry on any business, to make contracts and do any and all acts necessary, proper, incidental or convenient to said purposes and objects not inconsistent with the laws of Washington.

§ 787. Electrical Contractors.

To conduct a general contracting business and to do and supply electrical work of every kind and description in electrical plants, machinery, appliances and supplies; to construct, install, equip, repair and deal in plants, works, electrical machinery and appliances of every kind for generating, storing, transmitting, supplying and distributing electricity for light, heat, power and every purpose, public and private; to acquire, hold and dispose of inventions, patents and trademarks in the United States and foreign countries; to acquire, hold and dispose of any and all kinds of real and personal property; to conduct said business and every part thereof, as principal or agent, within and without the state of Washington; to carry on any business, make contracts and do any and every act necessary, proper, incidental or convenient to said purposes or objects not inconsistent with the laws of Washington.

§ 788. Express Business.

To carry and transfer goods, wares, merchandise and personal property of every kind from any place or places to any other place or places by means of wagons drawn by horses or other animals, or by electric, steam, gasoline or other motor cars, boats or vehicles, or by any other method of transportation; to contract with other companies or individuals to carry or transfer such property, and generally to carry on and conduct an express and transportation business; to acquire, hold and dispose of any and all kinds of real and personal prop-

erty; to conduct said business, as principal or agent, within and without the state of Washington; to carry on any business, make contracts and do any and every act necessary, proper, incidental or convenient to said purposes or objects not inconsistent with the laws of Washington.

§ 789. Fisheries and Canning.

To carry on the business of buying, catching, salting, packing, canning, storing, selling and otherwise dealing in fish and sea food of every kind, whether from fresh or salt water, and products thereof; to acquire, hold and dispose of any and all kinds of fishing boats, nets, tackle and appliances of every description for taking and catching fish; to acquire, establish, maintain and dispose of factories, agencies and depots for salting, packing, canning, storing and otherwise preserving and dealing in all kinds of food, fishes and products thereof; to acquire, hold and dispose of inventions, patents and trademarks in the United States and foreign countries; to acquire, hold and dispose of any and all kinds of real and personal property; to conduct said business, as principal or agent, within and without the state of Washington, and to carry on any business and do any and every act necessary, proper, incidental or convenient to said purposes and objects not inconsistent with the laws of Washington.

§ 790. Milling.

To grow, buy, handle, grind, mill, deal in and deal with, sell and otherwise dispose of wheat, rye, barley, oats, buckwheat, corn and other grains and cereals; to manufacture said grains and cereals into flour, meal, foodstuffs and every commodity produced therefrom; to buy, handle, store, warehouse, deal in and deal with, sell and otherwise dispose of said grains, cereals, flour, meal, foodstuffs and commodities; to buy, acquire, own, hold, sell or otherwise dispose of lands, buildings, wharves, docks, boats, barges, ships, transportation lines and systems by land and water, warehouses, elevators, mills, structures, machinery and appliances suitable or desired for purchasing, treating, handling, milling, storing, dealing in, selling or otherwise disposing of or utilizing any or all of said grains,

cereals, foodstuffs and commodities; to acquire, hold and dispose of inventions, patents, trademarks in the United States or foreign countries; to acquire, hold and dispose of any and all kinds of real and personal property; to conduct said business and any part thereof, as principal or agent, within and without the state of Washington, and to carry on any business and do any and every act necessary, proper, incidental or convenient to said purposes and objects not inconsistent with the laws of Washington.

§ 791. Lumber.

To buy, lease, acquire, hold, own, sell and otherwise dispose of timber, timber lands, lumber, mills, sawmills, plants, mill-sites, booms, boom-sites, roads, ways, logging roads, railroads, machinery, steam, electric, gasoline and other engines, water-power sites and machinery therefor, ships, boats, barges, steam, electric and gasoline cars, wagons, horses, and any other means of transportation by any form of power or energy now known or hereafter discovered, and to purchase, acquire, own, hold, manufacture, sell, and otherwise dispose of any and all kinds of timber, lumber and wood, and product or products thereof; and in general to carry on the business of timber and lumber manufacturers and merchants, as principal or agent, within and without the state of Washington; to acquire, hold and dispose of inventions, patents and trademarks in the United States or foreign countries; to acquire, hold and dispose of any and every kind of real or personal property, and to carry on any business, make contracts and do any and every act necessary, proper, incidental or convenient to said purposes and objects not inconsistent with the laws of Washington.

§ 792. Leather.

To manufacture, produce, tan, purchase and otherwise acquire, hold and sell or otherwise dispose of leather, lumber and belting; to acquire, hold and dispose of lands, timber, mills, plants, machinery, hides, bark supplies and other articles used in connection with the tanning and manufacture of leather; to acquire, hold and dispose of inventions, patents and trademarks in the United States and foreign countries; to ac-

quire, hold and dispose of any and all kinds of real and personal property; to conduct said business, as principal or agent, within and without the state of Washington; and to carry on any business, make contracts and do any and every act necessary, proper, incidental or convenient to said purposes and objects not inconsistent with the laws of Washington.

§ 793. Mining.

To explore, locate, acquire by purchase, lease or otherwise hold, own, work, exercise and develop, sell, lease, mortgage or otherwise dispose of any mines, mining rights and metalliferous land, and any interest therein; to acquire, smelt, reduce, refine, mill and otherwise treat, own, hold, sell and otherwise dispose of ores, minerals and metals; to crush, win, get, quarry, calcine, refine, dress, amalgamate, manipulate and prepare for market mineral substances of all kinds; to buy, build, construct, and otherwise acquire, own, hold, sell, lease, mortgage or otherwise dispose of ways, tramways, railways, bridges, waters, watercourses, reservoirs, aqueducts, wharves, docks, factories, warehouses, furnaces, crushing works, hydraulic works, electrical works, sawmills, cars, wagons, boats, ships, horses, engines, motors and vehicles of transportation of every kind, electric, steam and water-power plants and machinery and appliances therefor, and for the transmission thereof; to acquire, hold and dispose of inventions, patents and trademarks in the United States and foreign countries; to acquire, hold and dispose of any and all kinds of real and personal property; to conduct said mining and other business, as principal or agent, within and without the state of Washington, and to carry on any business, make contracts and do any and every act necessary, proper, incidental or convenient to said purposes and objects not inconsistent with the laws of Washington.

§ 794. Paper.

To manufacture, produce, purchase or otherwise acquire, hold, own, sell or otherwise deal in and dispose of paper, wood, pulp, fiber, iron pyrites, clay, sulphur, coal, agolite, fibrous

minerals and materials, and any and all ingredients, products, by-products and compounds thereof and used in connection with their manufacture; to acquire, hold and dispose of mines, wood lands, steam, electric and water-power and water rights. ways, roads, railways, watercourses and means of transmission and vehicles of transportation; to acquire, hold and dispose of inventions, patents and trademarks in the United States or foreign countries; to acquire, hold and dispose of any and all kinds of real and personal property; to carry on said business and any part thereof, as principal or agent, within and without the state of Washington, and to carry on any business, make contracts and do any and every act necessary, proper, incidental or convenient to any of said purposes and objects not inconsistent with the laws of Washington.

§ 795. Railroads.

To build, construct, maintain and operate a steam, electric or other railway or railroad from ..... to ....., which places shall be the termini of the railway or railroad; to operate the same by steam, electric or other power now known or hereafter discovered; to acquire, hold and dispose of ways, rights of way, yards, depots, stations and terminals; to build, construct, erect and otherwise acquire, hold and dispose of works, plants and systems for the manufacture, production and generation of steam and electrical energy, light, heat, and power and the transmission thereof; to build, acquire, hold and dispose of telephone and telegraph plants, facilities and systems and other means of communication; to build, acquire, hold and dispose of waters, docks, wharves, boats, sailing and steam boats, and ships and lines and systems thereof; to build, acquire, own, hold and dispose of, directly and indirectly, wagons, cars, boats, ships, vehicles, engines and motors of every kind; to carry, convey, transport and transmit for toll and hire persons, property, messages and communications; to acquire, hold and dispose of inventions, patents and trademarks in the United States and foreign countries; to acquire, hold and dispose of any and all kinds of real and personal property; to conduct and exercise said powers, purposes and business and any part thereof, as principal or agent, within

and without the state of Washington, and to carry on any business, make any contracts and do any and every act necessary, proper, incidental or convenient to said purposes and objects not inconsistent with the laws of Washington.

§ 796. Real Estate and Brokerage.

To act as agent, broker or attorney in fact for individuals and corporations in buying, selling, managing, leasing, renting, mortgaging and otherwise dealing in and disposing of real and personal property, leases and mortgages thereon, and any and every interest therein and collateral or appurtenant thereto, including choses in action and judgments; to make and obtain loans; to effect insurance against fire and other risks; to register, file and record mortgages, deeds and other instruments; to investigate and report upon the credit and financial solvency and reliability of borrowers, sureties and persons dealing in such property; to acquire, hold and dispose of inventions, patents and trademarks in the United States and foreign countries; to acquire, hold and dispose of any and all kinds of real and personal property, and in general to conduct a real estate and brokerage business, as principal or agent within and without the state of Washington, and to conduct any business, make contracts and do any and every act necessary, proper, incidental or convenient to said purposes and objects not inconsistent with the laws of Washington.

FORMS.

§ 797.

ARTICLES OF INCORPORATION OF KING COUNTY CONSTRUCTION COMPANY.

These presents witness that we, James Smith, Albert Jones, and William King, being desirous of forming a corporation for the purposes hereinafter specified, and in conformity with the laws of the State of Washington, do make and subscribe the following written Articles of Incorporation in triplicate.

ARTICLE I.

The corporate name of the company shall be: King County Construction Company.

ARTICLE II.

The objects for which the company shall be formed are: To build, construct, improve, equip, tear down, remove and do any work upon buildings and their foundations, excavations, structures and machines of every kind on lands and waters, and any and all kinds of streets, roads, ways, tramways, railroads, street railways, branches, extensions and sidings thereof, dams, bridges, reservoirs, watercourses, flumes and wharves, canals, sewers, tunnels and subways, plants for furnishing light, heat and power, by electricity or otherwise, systems, machinery, appliances and devices for the generation of steam, electrical or other power and force and energy of every kind; to acquire, hold and dispose of inventions, patents and trademarks relating thereto in the United States or foreign countries; to acquire, hold and dispose of any and all kinds of real and personal property; to carry on said business, as principal or agent, within or without the state of Washington; and to carry on any business, make contracts and do any and all acts necessary, proper, incidental or convenient to said purposes and objects not inconsistent with the laws of Washington.

ARTICLE III.

The amount of the capital stock of the company shall be ($100,000) one hundred thousand dollars.

ARTICLE IV.

The time of existence of the company shall be fifty years.

ARTICLE V.

The number of shares of which the capital stock of the company shall consist shall be (1,000) one thousand.

ARTICLE VI.

The number of trustees of the company shall be three, and the names and residences of the trustees who shall manage the concerns of the company until the third Tuesday in December, 1912, are

Names.	Residences.
James Smith	No. 1 Avenue A, Seattle
Albert Jones	No. 1 Avenue B, Seattle
William King	No. 1 Avenue C, Seattle

ARTICLE VII.

The principal place of business of the company is to be located in the city of Seattle, county of King, state of Washington.

In witness whereof we have this first day of September, A. D. 1912, hereunto set our hands and seals in triplicate.

JAMES SMITH. [Seal]
ALBERT JONES. [Seal]
WILLIAM KING. [Seal]

Signed, sealed and delivered in the presence of
BENJAMIN ALLEN.
JOHN WOOD.

State of Washington,
County of King,—ss.

I, Joseph White, a notary public in and for the state of Washington, duly commissioned, sworn and qualified, do

hereby certify that on this second day of September, A. D. 1912, personally appeared James Smith, Albert Jones and William King, to me known to be the individuals described in and who executed the within instrument and acknowledged that they signed and sealed the same as their free and voluntary act and deed and for the uses and purposes therein mentioned.

Given under my hand and official seal this second day of September, A. D. 1912.

[Notarial Seal] JOSEPH WHITE,
Notary Public.

§ 798. MINUTES

of

First Meeting of the Trustees of King County Construction Company, Held at No. 100 Second Avenue, Seattle, Washington, on September 10, 1912, at 10:30 o'clock in the forenoon.

Present: Messrs. James Smith,
Albert Jones,
William King,

being all of the trustees named in the Articles of Incorporation of the company.

The meeting was called to order by Mr. King.

Mr. King was elected temporary chairman and Mr. Smith was elected secretary pro tempore.

The chairman presented the notice of the First Trustees' Meeting, which with proof of service required by law was read and ordered spread upon the minutes of the meeting and is as follows:

§ 799.

NOTICE OF FIRST MEETING OF TRUSTEES OF KING COUNTY CONSTRUCTION COMPANY.

The undersigned, one of the trustees named in the Articles of Incorporation of the above-named company, hereby calls the first meeting of the trustees of said company, to be held

at No. 100 Second Avenue, Seattle, Washington, on the tenth day of September, 1912, at 10:30 o'clock in the forenoon.

Dated Seattle, Washington, September 5, 1912.

(Signed) WILLIAM KING,
Trustee.

State of Washington,
King County,—ss.

William King, first being duly sworn, deposes and says that on the fifth day of September, 1912, he personally delivered the annexed notice of meeting to each of the persons named in the Articles of Incorporation of King County Construction Company.

(Signed) WILLIAM KING.

Subscribed and sworn to before me this fifth day of September, 1912.

JOSEPH WHITE,
Notary Public in and for the State of Washington, Residing at 1616 E. Howell St., Seattle, Washington.

The original notice and proof of service was thereupon ordered filed among the records of the company.

§ 800.

The chairman then produced and read the oath taken and subscribed by the trustees as follows:

State of Washington,
County of King,—ss.

James Smith, Albert Jones and William King, being first duly sworn, on their oath say that they are the trustees named in the Articles of Incorporation of the King County Construction Company, and that they will each faithfully and honestly discharge the duties of their office as trustees.

JAMES SMITH.
ALBERT JONES.
WILLIAM KING.

Subscribed and sworn to before me this fourth day of September, 1912.

JOSEPH WHITE,

Notary Public in and for the State of Washington, Residing at 1616 East Howell St., Seattle, Washington.

The original oath was then ordered filed among the records of the company.

The chairman then produced the triplicate copy of the Articles of Incorporation of the company on file and of record in the office of the Secretary of State and the office of the county auditor of King County, in which the principal place of business of the company was located, and the same was read and ordered spread upon the minutes of the meeting and is as follows: [Take in Copy of Articles.]

The said triplicate original Articles of Incorporation were thereupon ordered filed among the records of the company.

At the request of the Chairman, counsel for the company then produced and read proposed by-laws of the company as follows:

§ 801.

BY-LAWS OF KING COUNTY CONSTRUCTION COMPANY.

ARTICLE I.

Meetings of Stockholders.

Section 1. The annual meeting of stockholders for the election of trustees and general corporate action shall be held at the principal office of the company at Seattle, King County, Washington, on the third Tuesday in December, in the year 1912, and each year thereafter at 12 o'clock M.

Sec. 2. Special meetings of the stockholders may be called and held at the said office of the company at any time by order of the board of trustees, and shall be called whenever stockholders of record owning one-tenth of the capital stock of the company issued and outstanding at the time shall make application in writing therefor to the board of trustees stating

the object of such meeting. The business transacted at special meetings shall be confined to the objects stated in the call.

Sec. 3. Notice of the time, place and object of each annual or special meeting of stockholders shall be given as prescribed by statute in any case, and shall be mailed to each stockholder at least ten days before the date set for each meeting, addressed to him at his place of residence or business, as the same appears in the list of addresses which shall be kept by the secretary of the company.

Sec. 4. At every election and meeting of the stockholders each stockholder shall be entitled to one vote in person or by proxy for each share of the capital stock owned by him and standing in his name on the books of the company. Each owner of stock entitled to vote may vote in person or by proxy duly appointed in writing.

Sec. 5. At all stockholders' meetings a majority of the shares of stock issued and outstanding at the time and having voting power, represented in person or by proxy, shall constitute a quorum. Meetings at which less than a majority of the shares of outstanding stock having voting power are represented may be adjourned to a future date by those who attend, provided that notice of such adjournment be mailed to each owner of stock at least three days before the date at which such meeting is adjourned, addressed to his place of business or residence as stated in the list of addresses kept by the secretary of the company.

ARTICLE II.

Trustees.

Section 1. The affairs of the company shall be managed by a board of three trustees.

Sec. 2. The trustees, except those first appointed by the articles, shall be elected by the stockholders at their annual meeting by ballot except as otherwise provided herein, and shall hold office for one year and until their successors are elected respectively.

Sec. 3. Vacancies in the board of trustees, whether original vacancies or caused by resignation or otherwise, may be filled

by the board at any meeting thereof at which a quorum is present.

Sec. 4. The board of trustees shall have the general management and control of all the property, business and concerns of the company; they shall define and limit the powers and duties of all committees, officers, agents and employees of the company not otherwise provided for by these by-laws; shall fix all salaries, and may require such bonds as they deem proper.

Sec. 5. They shall declare all dividends upon the capital stock of the company and generally do any and every lawful act requisite or advisable in order to effect the purposes of the corporation. They shall also keep a record of their proceedings.

Sec. 6. The board of trustees shall annually elect from their own number a president and one or more vice-presidents of the company. They shall also annually elect or appoint a secretary, treasurer and general manager, who may or may not be trustees as the board may in each case determine.

Sec. 7. Meetings of the board of trustees shall be held at such times and places within this state as the board itself may elect or may be called at any time by the president or by one-fourth of the members of the board on such notice as may be deemed advisable by those calling the meeting.

Sec. 8. A majority of the trustees shall constitute a quorum for the transaction of business, but a less number may adjourn from time to time; the secretary shall give such notice as he may deem proper of such adjournment to the absent trustees.

Sec. 9. The first meeting of the board of trustees, after each annual meeting of stockholders, shall be held without unnecessary delay for the election of officers and transaction of other business.

ARTICLE III.

Officers.

Section 1. The officers of the company shall be a president, one or more vice-presidents, a secretary and a treasurer. The offices of secretary and treasurer may be filled by the same per-

son, as also may those of vice-president and general manager if such there be.

Sec. 2. All of said officers other than the president may be removed at any time by a vote of a majority of the board of trustees, but otherwise they shall hold their respective offices for one year or until their successors are elected. Any and all vacancies that may occur in any of said offices may be filled by the trustees at any meeting of the board.

Sec. 3. The board of trustees may elect or appoint such other officers, agents and employees of the company as they may from time to time deem best, and upon such terms as they may in each case prescribe.

ARTICLE IV.

President and Vice-president.

Section 1. The president shall be the chief executive officer of the company, and shall preside at all meetings of the stockholders and of the board of trustees. He shall sign all certificates of stock, countersign all checks, and sign or countersign all bonds, notes and other evidences of indebtedness issued by the company, and shall, on behalf of the company, sign all contracts, unless some other officer be specifically authorized so to do by the board of trustees.

Sec. 2. He shall have the general oversight, care and management of all the property, business management and business of the company, subject always to the direction and control of the board of trustees. He shall make a report in writing to the stockholders at each annual meeting of the earnings and general business of the company, which report shall be first submitted to the board of trustees for their approval.

Sec. 3. In case of the absence or disability of the president, his powers and duties shall devolve upon and be performed by the vice-president; otherwise the vice-president shall have such powers and perform such duties as may be prescribed from time to time by the board of trustees.

ARTICLE V.

General Manager.

The general manager, if such there be, shall, subject to the board of trustees, control and have general charge of the construction work and operations of the company's business.

ARTICLE VI.

Secretary.

Section 1. The secretary shall be ex-officio secretary of all stockholders' meetings and of the board of trustees, and shall attend their meetings, keep the records of the proceedings at such meetings and be the custodian of the same.

Sec. 2. He shall, subject to the direction of the board of trustees, give all notices required for the election of trustees and for meetings of trustees and stockholders, and shall perform such other duties as may from time to time be assigned to him by the board of trustees.

Sec. 3. In case of the absence or disability of the secretary, the board of trustees may appoint a secretary pro tem. to perform his duties.

Sec. 4. The secretary shall also have charge of the corporate seal of the company and shall, in the course of its business, affix the same to all bonds and stock certificates issued; and when authorized by the board of trustees, he shall also affix said seal to contracts and other instruments.

ARTICLE VII.

Treasurer.

Section 1. The treasurer shall have the custody of all moneys belonging to the company, and shall keep the same deposited to the credit of and in the name of the company in such place or places as the board of trustees may from time to time designate; and shall also disburse the funds of the company under the direction of the board of trustees.

Sec. 2. He shall keep accurate books of account showing all receipts and disbursements of the company, which shall at

all times be open to the inspection of the trustees and the president.

Sec. 3. He shall sign, or countersign, all checks, drafts, orders for money, notes and receipts and certificates of stock of the company.

Sec. 4. He shall, whenever called upon, render to the board of trustees reports in writing of the business and condition of the company, and shall perform such other duties and have such other powers as may from time to time be prescribed by the board of trustees.

ARTICLE VIII.

Capital Stock, Its Transfer and Registration.

Section 1. The capital stock of the company shall be of two classes; one-half thereof to be preferred stock and one-half common stock.

Sec. 2. The holders of the preferred stock shall be entitled to receive, when and as any dividends are declared by the trustees, dividends at the rate of and not exceeding seven per centum per annum. Such dividends shall be cumulative, and if the profits of any one year declarable as dividends shall not be sufficient to pay or warrant the declaration of dividends, then the same shall be made up from profits of a later period until the full amount of dividends herein specified without interest shall have been paid upon or set apart for the preferred stock before any dividend is declared or paid on the common stock. The balance of the net profits of the company declarable as dividends may be distributed among the holders of the common stock at such times as may be fixed by the trustees; the par value of the preferred stock and accumulated and unpaid dividends thereon shall also, in the event of the dissolution of the company and disposition of its assets, be paid in full before any sum whatever is paid on account of the common stock, and thereafter the common stock shall be entitled to the entire assets remaining.

Sec. 3. All transfers of stock shall be signed by the stockholders in person or by attorney in a book to be provided for that purpose. At the time of each transfer the old certificate

for the shares transferred shall be surrendered and canceled, and a new certificate issued in lieu thereof.

Sec. 4. All certificates of stock issued by the company shall bear the seal of the company and be signed by the president or one of the vice-presidents and by the treasurer, and shall be countersigned by the transfer agent and registrar of transfers of the company if such there be.

Sec. 5. The board of trustees may appoint a transfer agent to facilitate transfers by stockholders under such regulations as the board may from time to time prescribe. They may also appoint a registrar of transfers of stock. After the appointment of such registrar of transfers, no certificate thereafter issued for stock shall be binding upon the corporation, or shall have any validity, unless countersigned by such registrar of transfers.

ARTICLE IX.

Seal.

Section 1. The corporate seal of the company shall contain the words "King County Construction Co." on the margin and the words "Incorporated Washington" around the figures "1912" in the center. The seal shall be kept in the charge and custody of the secretary of the company and must be affixed to all instruments requiring a seal.

ARTICLE X.

Amendments.

The by-laws may be altered or amended at any meeting of the board of trustees by a vote of the majority of the board.

After full consideration and discussion of each article and section thereof, said by-laws were, on motion duly made and seconded, unanimously adopted as the by-laws of the company.

§ 802.

On motion duly made and carried, the following was adopted as the stock certificate of the company:

KING COUNTY CONSTRUCTION COMPANY.

No. —— Incorporated Under the Laws —— Shares
of Washington.

Authorized Capital Stock, $100,000.

$50,000 Preferred Stock—$50,000 Common Stock.

{ Preferred Stock / or / Common Stock }

This certifies that ..... entitled to ..... shares of the preferred / common stock of King County Construction Company, transferable only on the books of the company by the holder hereof in person or by attorney upon surrender of this certificate duly indorsed.

The preferred stock, as more fully provided in the by-laws of the company, is entitled, in preference to the common stock, to cumulative dividends at the rate of seven per centum yearly and to payment of its par value and the amount of such cumulative dividends then unpaid in any distribution of assets.

In witness whereof the said company has caused its corporate seal to be affixed hereto and this certificate to be signed by its president or vice-president and secretary or treasurer.

[Corporate Seal] .....,
President.

.....,
Secretary.

(Indorsement for Transfer:)

For value received .... hereby sell, assign and transfer unto ..... shares of the capital represented by the within certificate, and hereby irrevocably constitute and appoint ....., attorney, to transfer the said stock on the books of the within named company, with full power of substitution in the premises.

Dated ....., 19.....

.....

In presence of .....

A recess was then taken and reassembling the Chairman announced that the entire capital stock had been subscribed. The subscription agreement was read and ordered spread upon the minutes of the meeting, and is as follows:

§ 803. SUBSCRIPTION TO STOCK.

King County Construction Company.

We, the undersigned, severally agree with King County Construction Company, and with each other, to take the number of shares of stock in said company set opposite our names at the par value of $100 each, and to pay for such shares of stock at such times and in such installments as the board of trustees of said company may by resolution require:

Names.	P. O. Addresses.	No. of Shares Common.	No. of Shares Preferred.
James Smith	30 Howell St., Seattle, Wash.	1	
Albert James	50 Cherry St., Seattle, Wash.	2	
William King	40 Pike St., Seattle, Wash.	2	
John Edwards	10 Cherry St., Seattle, Wash.	495	500

Dated Seattle, Washington, September 10, 1912.

The original subscription agreement was then ordered filed with the records of the company.

§ 804.

The meeting then proceeded to the election of officers by ballot, to serve until the third Tuesday in December, 1912. Mr. White was appointed teller and nominations for president, vice-president, secretary and treasurer having been made, the teller collected the ballots and reported the vote of the meeting as follows:

For president: William King—3 votes.

For vice-president: James Smith—3 votes.

For secretary: Albert Jones—3 votes.

For treasurer—Albert Jones—3 votes.

The Chairman declared the above named elected to the said offices respectively.

§ 805.

The Chairman then reported that he had received from Mr. John Edwards an offer in writing to assign, transfer and convey his entire construction business, including plant, fixtures, machinery, cash and stock on hand, and the entire assets thereof, including goodwill, to the company for the capital stock subscribed by him, amounting to 495 shares of the common stock and 500 shares of preferred stock of the company.

The said offer was read and ordered spread upon the minutes of the meeting, and is as follows: [Take in written offer.]

Mr. Edwards was thereupon invited into the meeting and made a full statement, in answer to questions and otherwise, as to the value of his said business and plant.

After Mr. Edwards retired the trustees had a prolonged discussion regarding his offer and the value of his plant and construction business, and thereafter, on motion duly made and carried, it was unanimously

"Resolved, that in the opinion of the trustees, after full investigation, consideration and discussion, the plant and construction business of Mr. John Edward is fairly and conservatively valued in his offer to the company; that the best interests of the company will be furthered by accepting the offer, and therefore be it further resolved that the offer of Mr. John Edwards to transfer his entire construction business, plant and goodwill to the company be and the same is hereby accepted; and be it further resolved that on receiving from Mr. Edwards an assignment, transfer and conveyance of his construction business, plant, assets and goodwill, examined by and approved by counsel for the company, the proper officers be and they are hereby authorized and directed to issue to Mr. Edwards and his appointees 500 shares of the preferred and 495 shares of the common stock of the company."

On motion duly made and carried, the meeting adjourned.

.....,

Secretary.

§ 806.

STATEMENT OF OFFICERS OF KING COUNTY CONSTRUCTION COMPANY.

King County Construction Company, a corporation organized and existing under the laws of Washington, in compliance therewith makes and files this statement containing the following list of all of its officers and their respective titles of office, names and addresses, and the term of office for which they have been chosen:

Name.	Address.	Term of Office.
President: William King	No. 1 Avenue C, Seattle, Wash.	Until Third Tuesday in December, 1912.
Vice-President: James Smith	No. 1 Avenue A, Seattle, Wash.	Until Third Tuesday in December, 1912.
Secretary: Albert Jones	No. 1 Avenue B, Seattle, Wash.	Until Third Tuesday in December, 1912.
Treasurer: Albert Jones	No. 1 Avenue B, Seattle, Wash.	Until Third Tuesday in December, 1912.

In witness whereof the company has executed this statement in its corporate name, sealed with its corporate seal, attested by its secretary, and sworn to by its president, this 15th day of September, 1912.

KING COUNTY CONSTRUCTION COMPANY.
By WILLIAM KING,
President.

[Corporate Seal] Attest: ALBERT JONES,
Secretary.

State of Washington,
County of King,—ss.

William King, first being duly sworn, deposes and says that he is the president of King County Construction Company, and that the foregoing annexed statement contains a true and complete list of all the officers of said company and their re-

spective titles of office, names and addresses and the term of office for which they have been chosen.

[Signed] WILLIAM KING.

Subscribed and sworn to before me, a notary public in and for King County, State of Washington, residing at 1616 E. Howell St., Seattle.

[Notarial Seal] JOSEPH WHITE.

§ 807.

NOTICE OF CHANGE OF NAME OF ELECTRICAL CONSTRUCTION COMPANY

Formerly

KING COUNTY CONSTRUCTION COMPANY.

The undersigned, William King, president of Electrical Construction Company, signs this written notice to be filed by the company in compliance with the laws of the state of Washington, setting forth as follows:

I. The former corporate name of the company was King County Construction Company.

II. The corporate name of the company as changed is Electrical Construction Company.

III. Supplemental articles making such change of name have been filed in the office of the Secretary of State and in the office of the county auditor of King County, Washington.

In witness whereof I have hereunto set my hand and seal this 28th day of September, 1912.

WILLIAM KING,
President.

§ 808.

SUPPLEMENTAL ARTICLES OF INCORPORATION OF KING COUNTY CONSTRUCTION COMPANY.

The King County Construction Company being desirous of changing its said name to be hereafter Electrical Construction Company, in conformity with the laws of the state of Wash-

ington, makes and executes these Supplemental Articles of Incorporation, and certifies as follows:

ARTICLE I.

The name of the corporation is hereby changed from its former name, King County Construction Company, and shall hereafter be

Electrical Construction Company.

ARTICLE II.

The corporate seal of the company shall be changed to conform to the newly adopted name.

In witness whereof the company has caused these presents to be executed and filed in its former corporate name by its president and its former corporate seal to be hereto affixed and attested by its secretary, this 20th day of September, 1912.

[Corporate Seal]

KING COUNTY CONSTRUCTION COMPANY,
Per WILLIAM KING,
President.
Attest: ALBERT JONES,
Secretary.

State of Washington,
County of King.

On this 20th day of September, 1912, before me personally appeared William King, to me known to be the president of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

JOSEPH WHITE,
Notary Public in and for the State of Washington, Residing at 1616 E. Howell St., Seattle, Wash.

§ 809.

CERTIFICATE OF INCREASE [OR REDUCTION] OF THE CAPITAL STOCK OF KING COUNTY CONSTRUCTION COMPANY.

We, the undersigned, William King, Chairman, and James Smith, Secretary, respectively, of a special meeting of the stockholders of King County Construction Company, a corporation organized and existing under the laws of the state of Washington, held for the purpose of increasing the capital stock of the company, do make, sign and verify this certificate of the proceedings, showing a compliance with the laws of Washington, as follows:

That prior to such meeting a notice specifying the object of the meeting, the place where it was to be held, and the amount to which it was proposed to increase the capital, signed by at least a majority of the trustees of the company, was published once a week for at least eight weeks in the "Seattle Daily Bulletin," a newspaper published in King County, where the principal place of business of the company is located.

That the following is a true copy of said notice:

NOTICE TO STOCKHOLDERS.

Seattle, Washington, Sept. 25, 1912.

A special meeting of the stockholders of King County Construction Company will be held on the twelfth day of December, 1912, at 11 o'clock A. M., at the office of said company, at No. 100 Second Avenue, Seattle, Washington, for the purpose of voting upon a proposition to increase the capital stock of the company from $100,000, consisting of 1,000 shares of the par value of $100 each, to $150,000, consisting of 1,500 shares of the par value of $100 each.

WILLIAM KING,
JAMES SMITH,
ALBERT JONES,
Trustees of King County Construction Company.

That a copy of such notice was also duly mailed to each stockholder at least ten days before the date specified for said

meeting, addressed to him at his place of business or residence as the same appears in the list of addresses kept by the secretary of the company.

That at the time and place specified in said notice, stockholders of the company appeared in person or by proxy, representing at least two-thirds of all the shares of the stock of the company, and organized said meeting by choosing from their number the undersigned, William King, as chairman and the undersigned, James Smith, as secretary thereof.

That the notice of the meeting and proof of the proper publishing and mailing thereof was presented and read and ordered spread upon the minutes of the meeting.

That upon motion duly made and seconded a vote of the stockholders present in person or by proxy was then taken upon the following resolution:

Resolved, that the capital stock of King County Construction Company be increased from the present amount thereof, to wit: One hundred thousand dollars ($100,000), consisting of one thousand (1,000) shares of the par value of one hundred dollars ($100) each, to one hundred and fifty thousand dollars ($150,000), to consist of fifteen hundred (1,500) shares of the par value of one hundred dollars ($100) each; and be it further

Resolved, that the chairman and secretary of this meeting be and they are hereby authorized and directed to make, sign and verify the certificates of the proceeding, showing compliance with the provisions of the laws of Washington, certified to by a majority of the trustees of the company, and cause one of such certificates to be filed in the office of the Secretary of State and another in the office of the county auditor of King County, Washington, the county in which the principal place of business of the company is located, and to do all acts and things that may be necessary or proper to comply with the provisions of law applicable to and regulating such increase of capital stock.

That stockholders of the company representing seven hundred and sixty-five (765) shares of stock, being in excess of two-thirds of all the shares of the stock of the company, voted

in favor of said resolutions; and stockholders representing seventy-five shares of the stock of the company voted against said resolutions.

That a sufficient number of the shares of stock of the company having been voted in favor of such increase, said resolutions were declared duly adopted.

That the amount of capital of the company actually paid in is one hundred thousand dollars ($100,000).

That the whole amount of the debts and liabilities of the company is forty thousand dollars ($40,000).

That the amount to which the capital stock is to be increased is one hundred and fifty thousand dollars ($150,000), consisting of fifteen hundred (1,500) shares of the par value of one hundred dollars ($100) each.

In witness whereof we have made, signed and verified this certificate, certified to by a majority of the trustees all in triplicate, this 15th day of December, 1912.

WILLIAM KING,
Chairman.
JAMES SMITH,
Secretary.

State of Washington,
County of King,—ss.

William King and James Smith, being first severally duly sworn, on their oaths do depose and say, and each for himself deposes and says, that he, the said William King, acted as chairman and he, the said James Smith, acted as secretary of said meeting of stockholders of King County Construction Company, held at 100 Second Avenue, Seattle, Washington, on the twelfth day of December, 1912; that he signed said foregoing certificate; that he has read said certificate and knows its contents, and that the same are true.

WILLIAM KING,
Chairman.
JAMES SMITH,
Secretary.

Sworn to before me this fifteenth day of December, 1912.

[Notarial Seal] JOSEPH WHITE,

Notary Public in and for the State of Washington, King County, Residing at 1616 E. Howell St., Seattle, Washington.

§ 810. CERTIFICATE OF TRUSTEES.

We, the undersigned, hereby certify that we are a majority of the trustees of King County Construction Company; that from the beginning we have been cognizant of the proceedings of the said company to increase its capital stock; that we have read the foregoing annexed certificate of proceedings and know the contents thereof, and that the same are true, and that said certificate is made, signed and verified by the persons who acted as chairman and secretary, respectively, of said meeting of stockholders of said company.

Witness our hands and seals this fifteenth day of September, 1912.

WILLIAM KING, [Seal]
ALBERT JONES, [Seal]
JAMES SMITH, [Seal]
Trustees.

State of Washington,
County of King,—ss.

I, Joseph White, a notary public in and for the state of Washington, duly commissioned and qualified, do hereby certify that on this fifteenth day of December, 1912, before me personally appeared William King, Albert Jones and James Smith, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed and for the uses and purposes therein mentioned.

Given under my hand and official seal this fifteenth day of December, 1912.

JOSEPH WHITE,
Notary Public.

§ 811.

APPOINTMENT OF AGENT BY FOREIGN CORPORATION.

Pursuant to the provisions and requirements of the laws of the state of Washington, Ohio Construction Company, a corporation incorporated under the laws of the state of Ohio, for construction and other purposes for which domestic corporations are authorized to be formed by the laws of the state of Washington, hereby appoints an agent residing at the place in the state where the principal business of the corporation is to be carried on, designated as follows:

I. The name of the agent is George Adams.

II. The place of residence of said agent is 140 Avenue B, Tacoma, Washington.

III. The place where the principal business of such corporation is to be carried on is No. 105 Cherry Street, Tacoma, Washington, at which place said agent has his office.

IV. Said agent is hereby authorized to accept service of process in any action or suit pertaining to the property, business or transactions of such corporation within this state in which such corporation may be a party.

In witness whereof, Ohio Construction Company has caused these presents to be signed by its president and attested by its corporate seal this twentieth day of September, 1912.

[Corporate Seal] GEORGE H. McKINLEY,
President of Ohio Construction Company.

§ 812. PROXY [POWER OF ATTORNEY].

Know all men by these presents, that I, William King, do hereby constitute and appoint Joseph White to be my lawful attorney, substitute and proxy in my name, place and stead, to vote upon all stock held by me in King County Construction Company at the annual meeting of stockholders of said corporation to be held on the third Tuesday in December, 1912 (or special meeting designated), and at any adjourned meeting thereof, as fully and with the same effect upon all matters and to all intents and purposes as I might or could

do were I personally present at such meeting; and I hereby revoke any proxy or proxies heretofore given by me to any person or persons whatsoever.

In witness whereof I have hereunto set my hand and seal this tenth day of December, 1912.

.....

In presence of

.....

§ 813.

ARTICLES OF INCORPORATION OF SPOKANE SAVINGS AND LOAN SOCIETY [ASSOCIATION].

We, the undersigned citizens of the state of Washington, desiring to form a savings and loan society [association] for the purpose of accumulating the savings and funds of its members and lending its shareholders or others the funds so accumulated, do make, acknowledge and file Articles of Incorporation specifying:

(a) The name of the proposed association shall be Spokane Savings and Loan Society.

(b) The city and county wherein the principal place of business of the association is to be located are the city of Spokane, County of Spokane, within the state of Washington.

(c) The number of its directors shall be nine. The first board of directors shall hold office for a term of three months from the time said association is authorized to do business.

(d) The names, occupation and postoffice addresses of its first directors are:

Names.	Occupation.	Postoffice Addresses.
John Smith.	Real Estate Agent.	No. 10 Pacific Ave., Spokane, Wash.
George Jones,	Doctor.	No. 11 Pacific Ave., Spokane, Wash.
William Smith.	Farmer.	No. 12 Pacific Ave., Spokane, Wash.
Henry Jones,	Salesman.	No. 13 Pacific Ave., Spokane, Wash.
Robert Allen.	Physician.	No. 14 Atlantic Ave., Spokane, Wash.
Joseph Allen.	Druggist.	No. 15 Atlantic Ave., Spokane, Wash.
John Bailey.	Grocer.	No. 16 Atlantic Ave., Spokane, Wash.
William Manley.	Lawyer.	No. 17 Atlantic Ave., Spokane, Wash.
Joseph Manley.	Banker.	No. 18 Atlantic Ave., Spokane, Wash.

(e) The names, occupation and postoffice addresses of the subscribers to the Articles of Incorporation and the number

of shares which each has agreed to take, the matured value of which shares so subscribed shall be $25,000, are

Names.	Occupation.	Postoffice Addresses.	Shares.
John Smith.	Real Estate Agent.	No. 10 Pacific Ave., Spokane, Wash.	25
George Jones,	Doctor.	No. 11 Pacific Ave., Spokane, Wash.	35
William Smith.	Farmer.	No. 12 Pacific Ave., Spokane, Wash.	15
Henry Jones,	Salesman.	No. 13 Pacific Ave., Spokane, Wash.	25
Robert Allen.	Physician.	No. 14 Atlantic Ave., Spokane, Wash.	45
Joseph Allen.	Druggist.	No. 15 Atlantic Ave., Spokane, Wash.	20
John Bailey.	Grocer.	No. 16 Atlantic Ave., Spokane, Wash.	15
William Manley.	Lawyer.	No. 17 Atlantic Ave., Spokane, Wash.	20
Joseph Manley.	Banker.	No. 18 Atlantic Ave., Spokane, Wash.	25
George Allen.	Grocer.	No. 19 Pacific Ave., Spokane, Wash.	25

(f) The limit of capital to be accumulated shall be $2,500,000.

(g) The time of duration of said association shall be fifty years.

In witness whereof we have hereunto set our hands and seals this fifteenth day of April, 1913.

JOHN SMITH. [Seal]
GEORGE JONES. [Seal]
WILLIAM SMITH. [Seal]
HENRY JONES. [Seal]
ROBERT ALLEN. [Seal]
JOSEPH ALLEN. [Seal]
JOHN BAILEY. [Seal]
WILLIAM MANLEY. [Seal]
JOSEPH MANLEY. [Seal]
GEORGE ALLEN. [Seal]

State of Washington,
County of Spokane,—ss.

I, Joseph White, a notary public in and for the state of Washington, duly commissioned, sworn and qualified, do hereby certify that on this fifteenth day of April, 1913, before me personally appeared John Smith, George Jones, William Smith, Henry Jones, Robert Allen, Joseph Allen, John Bailey, William Manley, Joseph Manley and George Allen, to me known to be the individuals described in and who executed the within instrument and acknowledged that they

signed and sealed the same as their free and voluntary act and deed and for the uses and purposes therein mentioned.

Given under my hand and official seal this fifteenth day of April, 1913.

[Notarial Seal] JOSEPH WHITE,

Notary Public, No. 1616 East Howell St., Seattle, Wash.

§ 814.

CERTIFICATE OF ORGANIZATION OF TACOMA TRUST COMPANY.

We, the undersigned, being seven persons of full age, desirous of becoming a trust company on the terms and conditions and subject to the liabilities prescribed by the laws of the state of Washington, do execute and acknowledge this organization certificate in triplicate and do specifically state as follows:

(1) The name by which the corporation shall be known is Tacoma Trust Company.

(2) The place where the business of the corporation is to be transacted is Tacoma, Washington.

(3) The amount of the capital stock of the corporation is two million five hundred thousand dollars ($2,500,000), and the number of shares into which the same is to be divided is twenty-five thousand (25,000).

(4) The name, residence and postoffice address of each member of the corporation are

Names.	Residences.	Postoffice Addresses.
John Smith.	No. 100 5th Ave., Tacoma, Wash.	No. 100 5th Ave., Tacoma, Wash.
Henry Smith.	No. 45 South St., Tacoma, Wash.	P. O. Box 610, Tacoma, Wash.
James Alder.	No. 62 North St., Tacoma, Wash.	No. 62 North St., Tacoma, Wash.
Joseph Alder.	No. 230 West St., Tacoma, Wash.	P. O. Box 1312, Tacoma, Wash.
Frank Allen.	No. 34 Western Ave., Tacoma, Wash.	P. O. Box 1360, Tacoma, Wash.
James Allen.	No. 39 South. St., Tacoma, Wash.	No. 39 South St., Tacoma, Wash.
John Bailey.	No. 305 6th Ave., Tacoma, Wash.	P. O. Box 1410, Tacoma, Wash.

(5) The term of the existence of the corporation shall be fifty years.

In witness whereof we have hereunto set our hands and seals this eleventh day September, A. D. 1912.

JOHN SMITH. [Seal]
HENRY SMITH. [Seal]
JAMES ALDER. [Seal]
JOSEPH ALDER. [Seal]
FRANK ALLEN. [Seal]
JAMES ALLEN. [Seal]
JOHN BAILEY. [Seal]

State of Washington,
County of .....,—ss.

I, Joseph White, a notary public in and for the state of Washington, duly commissioned, sworn and qualified, do hereby certify that on this eleventh day of September, A. D. 1912, before me personally appeared John Smith, Henry Smith, James Alder, Joseph Alder, Frank Allen, James Allen, John Bailey, to me known to be the individuals described in and who executed the within instrument and acknowledged that they signed and sealed the same as their free and voluntary act and deed and for the uses and purposes therein mentioned.

Given under my hand and official seal this eleventh day of September, 1912.

[Notarial Seal] JOSEPH WHITE,
Notary Public.

§ 815.

ARTICLES OF INCORPORATION OF TRADERS' BANK OF COMMERCE.

The undersigned being desirous of becoming incorporated for the purpose of conducting and carrying on a general banking business, do execute and acknowledge these articles specifying as follows:

1. The name assumed by such bank shall be Traders' Bank of Commerce.

2. The county and city where such bank is to be located is the county of King and the city of Seattle.

3. The nature of its business shall be that of a commercial bank.

4. The amount of its capital stock which shall be divided into shares of one hundred dollars each shall be two hundred and fifty thousand dollars ($250,000).

5. The period for which such bank is organized shall be fifty years.

In witness whereof we have hereunto set our hands and seals this fifteenth day of September, 1912.

ARTHUR JONES. [Seal]
THOMAS BENSON. [Seal]
WILLIAM KING. [Seal]

State of Washington,
County of King,—ss.

I, Joseph White, a notary public in and for the state of Washington, duly commissioned, sworn and qualified, do hereby certify that on this fifteenth day of September, A. D. 1912, before me personally appeared Arthur Jones, Thomas Benson and William King, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed and for the uses and purposes therein mentioned.

Given under my hand and official seal this fifteenth day of September, A. D. 1912.

[Notarial Seal] JOSEPH WHITE,
Notary Public.

§ 816.

FORM OF CORPORATE BOND SECURED BY MORTGAGE.

UNITED STATES OF AMERICA.

State of .....

No. $1,000

..... CONSTRUCTION COMPANY.

First Consolidated Mortgage Four and One-half Per Cent Twenty-Year Gold Bond.

..... Construction Company, a corporation duly organized under the laws of the state of ..... for value received, promises to pay to the bearer or, if this bond be registered, then to the registered holder hereof, at the office of ..... trust company, in the city, county and state of ..... one thousand dollars ($1,000) in good coin of the United States of America of the present standard of weight and fineness, on the twenty-second day of January, A. D. 1923, and also to pay interest on said principal sum from the twenty-second day of January, 1903, semi-annually in like coin, at the rate of four and one-half per centum (4½%) per annum on the twenty-second days of July and January in each year on presentation and surrender at the office of said trust company of the interest coupons hereto annexed as the same become due respectively.

This bond is one of a series of seven thousand five hundred (7,500) bonds numbered consecutively from 1 to 7,500, both numbers inclusive, all of like date, tenor and amount and all equally secured by a First Consolidated Mortgage bearing even date herewith, duly executed and delivered by said ..... Construction Company to said ..... Trust Company, as trustee, and conveying to said trustee by way of mortgage certain lands and premises, with the appurtenances, as by reference to said mortgage will more fully and at large appear; subject to the terms, conditions and provisions of which said mortgage this bond is issued, accepted and held.

This bond may be registered in the name of the owner, in the manner and with the effect provided in the said mortgage.

This bond shall not be obligatory or valid for any purpose until the certificate indorsed hereon is signed by the trustee under said mortgage.

In witness whereof said ..... Construction Company has caused its corporate seal to be hereunto affixed and attested by its secretary and this bond to be signed in its corporate name by its president, and has also caused the facsimile signature of its treasurer to be engraved upon the annexed coupons, all this twenty-second day of January, one thousand nine hundred and three.

..... CONSTRUCTION COMPANY,
By .....,
President.

Attest: .....,
Secretary.

(Coupon.)

No. $22.50

..... Construction Company will pay to the bearer on the twenty-second day of ....., at the office of ..... Trust Company, in the city of ....., twenty-two dollars and fifty cents in gold coin of the United States of America, for six months' interest then due on its First Consolidated Mortgage gold bond No. ....

Coupon No. ....

....., Treasurer.

(Trustee's Certificate.)

..... Trust Company hereby certifies that the within bond is one of the series and issue of bonds described in the mortgage therein mentioned.

..... Trust Company,
Trustee.
By .....

§ 817.

NOTICE OF ANNUAL MEETING OF STOCKHOLDERS OF KING COUNTY CONSTRUCTION COMPANY.

Notice is hereby given that the annual meeting of stockholders of King County Construction Company will be held at the office of the company at No. 100 Second Avenue, Seattle, Washington, on the seventeenth day of December, 1912, at 10:30 o'clock in the forenoon, for the annual election of trustees and for (insert any special purpose), and for the transaction of such other business as may properly come before said meeting.

Dated Seattle, December 1, 1912.

JAMES SMITH,
Secretary.

§ 818.

NOTICE OF [ANNUAL, REGULAR, SPECIAL, AS THE CASE MAY BE] MEETING OF THE BOARD OF TRUSTEES OF KING COUNTY CONSTRUCTION COMPANY.

To the Trustees of King County Construction Company:

You and each of you are hereby notified that a (special, regular, annual) meeting of the board of trustees of King County Construction Company will be held at the office of the company, at No. 100 Second Avenue, in the city of Seattle, King County, Washington, on the twentieth day of September, 1912, for the purpose of ....., and of transacting such other business as may come before the meeting.

Dated at Seattle, Washington, this eleventh day of September, 1912.

KING COUNTY CONSTRUCTION COMPANY,
[Corporate Seal] By .....,
Secretary.

§ 819.

WAIVER OF NOTICE OF [ANNUAL, REGULAR, SPECIAL] MEETING OF BOARD OF DIRECTORS OF KING COUNTY CONSTRUCTION COMPANY.

I, ..., trustee of King County Construction Company, hereby admit due and timely service of the notice of which a copy is hereto annexed, and do hereby waive notice of the meeting therein mentioned and the lapse of any prescribed period of time, and I do hereby authorize and approve the acts of the trustees at such meeting.

....,
Trustee.

In the presence of

.....

§ 820.

NOTICE OF REMOVAL OF PRINCIPAL PLACE OF BUSINESS OF KING COUNTY CONSTRUCTION COMPANY.

To Whom It May Concern:

Notice is hereby given that on the thirtieth day of September, 1912, the principal place of business of King County Construction Company will be removed from 100 Second Ave., Seattle, King County, Washington, to the city of West Seattle, King County (or if out of county specify city, town and county), Washington.

Dated Seattle, Washington, September 12, 1912.

KING COUNTY CONSTRUCTION COMPANY,
[Corporate Seal] By JAMES SMITH,
Secretary.

§ 821.

NOTICE OF ASSESSMENT AND SALE OF SHARES OF STOCK IN KING COUNTY CONSTRUCTION COMPANY.

To John Smith, Henry Jones, William Barnes, George King, and Each of You, Stockholders in King County Construction Company.

Notice is hereby given that of the balance of $25 per share still unpaid on your several subscriptions to the stock of the said company, the trustees of the company do hereby make an assessment of $15 per share, and do hereby call and demand payment from each of you of $15 per share of stock in the company so held by you severally, being $150 on the ten shares of stock so held by John Smith, $225 on the 15 shares of stock so held by Henry Jones, $300 on the 20 shares of stock so held by William Barnes, and $450 on the 30 shares of stock so held by George King, said payment and payments to be made to the company at its office on or before October 20, 1912, and upon default or failure to make such payments by any of you, so many of said shares so held by him as will be necessary for the payment of the said assessments on the shares held by him will be sold at public auction by Robert Jenkins, public auctioneer, on the front steps of the county courthouse, at Seattle, Washington, on the twenty-second day of October, 1912, at 12 M., and at such sale the person who shall pay the assessment so due together with the expenses of advertising and sale for the smallest number of shares or portion of a share, as the case may be, shall be deemed the highest bidder.

Dated Seattle, Washington, September 11, 1912.

WILLIAM KING,
JAMES SMITH,
ALBERT JONES,
Trustees.

§ 822.

PETITION FOR VOLUNTARY DISSOLUTION.

Superior Court, King County, Washington.

In the Matter of the Voluntary Dissolution of KING COUNTY CONSTRUCTION COMPANY.

To Hon. ....., Judge of the Superior Court of King County:

The petition of King County Construction Company respectfully alleges and shows:

That your petitioner, its trustees and officers, have discovered that the stock, effects and other property of it, said petitioner corporation, are not sufficient to pay all just demands for which it is liable, or to afford reasonable security to those who may deal with it, and that (state any special reason), and that your petitioner, its trustees and stockholders, deem it beneficial to the interests of the stockholders that the said corporation be dissolved;

That the principal place of business of said corporation is located at No. 100 Second Avenue, King County, Seattle;

Wherefore your petitioner prays that a final order be made and entered declaring said corporation dissolved and that a receiver of the property and effects of said corporation be appointed, and for such other and further relief as may be proper.

KING COUNTY CONSTRUCTION COMPANY.
[Corporate Seal] By WILLIAM KING,
President.

Attest: JAMES SMITH,
Secretary.

State of Washington,
County of King,—ss.

William King, being first duly sworn, on his oath says that he is the president of King County Construction Company; that as such he executed the foregoing petition in the name of the corporation by order of the trustees thereof; that he

has read said foregoing petition and knows the contents thereof, and that the same are true.

WILLIAM KING.

Subscribed and sworn to before me this tenth day of September, 1912.

[Notarial Seal] JOSEPH WHITE,
Notary Public for the State of Washington.

§ 823. CERTIFICATE OF OFFICERS.

Superior Court, King County, Washington.

In the Matter of the Voluntary Dissolution of KING COUNTY CONSTRUCTION COMPANY.

We, the undersigned president and secretary of King County Construction Company, hereby certify and set forth that at a meeting of the stockholders of the said corporation, called for the purpose, it was decided by a vote of two-thirds of all the stockholders to disincorporate and dissolve the corporation.

Witness our hands and seals this tenth day of September, 1912.

WILLIAM KING,
President.
JAMES SMITH,
Secretary.

(Acknowledgment.)

§ 824.

ARTICLES OF ASSOCIATION OF PACIFIC CO-OPERATIVE LUMBER COMPANY.

We, the undersigned, being desirous of associating ourselves together as a co-operative association for the transaction of the business hereinafter specified on the co-operative plan, and in conformity with the laws of the state of Washington, do hereby prepare and subscribe articles of association setting forth as follows:

1. The name of the association shall be Pacific Co-operative Lumber Company.

2. The purpose for which it is formed is [copy form 791].

3. Its principal place of business shall be No. 200 Cherry street, Seattle, King county, state of Washington.

4. The term for which it is to exist shall be fifty years.

5. The amount of its capital stock shall be one million dollars ($1,000,000), consisting of ten thousand (10,000) shares of the par value of one hundred dollars ($100) each.

In witness whereof we have this fourteenth day of April, A. D. 1913, hereunto set our hands and seals.

JOHN SMITH. [Seal]
ANDREW JONES. [Seal]
GEORGE KING. [Seal]
ALBERT WOOD. [Seal]
ARTHUR SMITH. [Seal]

Signed, sealed and delivered in the presence of
BENJAMIN ALLEN.
JOHN WOOD.

State of Washington,
County of King,—ss.

I, Joseph White, a notary public in and for the state of Washington, duly commissioned, sworn and qualified, do hereby certify that on this fourteenth day of April, 1913, personally appeared John Smith, Andrew Jones, George King, Albert Wood and Arthur Smith, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed and for the uses and purposes therein mentioned.

Given under my hand and official seal this fourteenth day of April, 1913.

[Notarial Seal] JOSEPH WHITE,
Notary Public.

FEES CHARGED BY SECRETARY OF STATE.

The following fees will be charged in the office of the Secretary of State on and after June 12, 1907, *and must be paid in advance.*

CORPORATIONS, INCLUDING ALL CORPORATIONS REQUIRED TO FILE ARTICLES WITH THE SECRETARY OF STATE, EXCEPTING THOSE ORGANIZED FOR RELIGIOUS, SOCIAL, CHARITABLE OR EDUCATIONAL PURPOSES. (See Laws 1907, Chapters 134 and 140.)

*Filing and recording ARTICLES OF INCORPORATION	$25 00
*Filing and recording AMENDATORY OR SUPPLEMENTAL ARTICLES.	10 00
*Filing and recording CERTIFICATE OF INCREASE OF DECREASE OF CAPITAL STOCK	10 00
Filing and recording APPOINTMENT OR REVOCATION OF APPOINTMENT OF RESIDENT AGENT of foreign corporation	5 00
*CERTIFIED COPY of articles of incorporation	5 00
CERTIFIED COPY amendatory or supplemental articles	5 00
CERTIFIED COPY of certificate of increase or decrease of capital stock	5 00
CERTIFIED COPY of certificate of appointment or revocation of appointment of resident agent	5 00
Duplicate license	25
Penalty for nonpayment of license fee prior to July 1st, in advance	2 50
Reinstatement penalty, corporations four years delinquent	100 00
Reinstatement penalty, less than four years, per annum	20 00
Filing and recording notice of dissolution	5 00
ANNUAL CORPORATION LICENSE fee (payable in advance on or before July 1st of each year)	15 00
Furnishing and certifying to a printed compilation of the CORPORATION LAWS	5 00

Resolution to extend branch lines of railways, etc., $5.00 and 15¢ per folio for filing and recording.

For certified copy of such resolutions, $2 and 15¢ per folio.

RELIGIOUS, SOCIAL, CHARITABLE AND EDUCATIONAL ORGANIZATIONS.

Filing and recording articles of religious, educational, social and charitable corporations	$5 00
Filing and recording articles of agreement of SOCIAL, CHARITABLE and EDUCATIONAL ASSOCIATIONS (eleemosynary incorpora-	

**Whenever the articles exceed twenty folios there shall be an additional charge of 15¢ per folio for all extra folios in excess of the first twenty.*

RELIGIOUS, SOCIAL, CHARITABLE AND EDUCATIONAL ORGANIZATIONS—Continued:

tions), including certified copy of certificate for filing with county auditor (Law of 1895)	$7 45
Filing and recording amendment or amendments	5 00
Filing and recording notice of dissolution	5 00

MISCELLANEOUS.

Filing BOOM PLAT	5 00
Filing and recording TRADEMARK	5 00
Filing ORDER OF BOARD OF COUNTY COMMISSIONERS incorporating cities and towns	5 00
For ANY CERTIFICATE UNDER SEAL OF STATE	2 00
For filing and recording articles of CEMETERY ASSOCIATIONS	5 00
For recording miscellaneous records, papers or other documents, 10¢ per folio and $5 for filing in each case.	
For copy of any law, record or other document or paper, 15¢ per folio and certificate of $2 in addition.	

NOTE.—*Postage stamps will not be accepted in payment of any of the above fees.*

NOTE.—*All fees must be paid in advance. Original articles offered for filing must be accompanied by filing and recording fee of $25.00, as also annual license fee of $15.00. The fiscal year ends on June 30th, on which date all corporation licenses expire, no matter on what date issued. Fractional years are not recognized in the payment of license fees. Thus, a company filing articles on June 1st, must pay the full license fee of $15.00 at the time of filing, and the license fee for the succeeding year must be paid before July 1st, otherwise a penalty of $2.50 is added.*

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